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THE PROFESSION AND PRACTICE OF THE LAW IN ENGLAND AND AMERICA

From July 24–29, 1957, the Annual Convention of the American Bar Association will be meeting in London and some 3,000 American lawyers will be conferring among themselves and with their English colleagues. It has, therefore, been thought worthwhile to attempt to summarise some of the main respects in which English legal practice contrasts with that in America. This, it is hoped, will be helpful both to our American visitors and to their English hosts. One difficulty in performing this task—a difficulty which is itself characteristic of the differences between the two countries—is the paucity of statistics relating to the English profession in contrast with the wealth of material available about the American. During the last few years the American Bar Association has sponsored an elaborate Survey of the Legal Profession as a result of which it is possible to speak with some assurance about numbers of American practitioners, their geographical distribution, their earnings, the types of practice in which they engage, and so on. We have drawn extensively on the published results of this Survey [1] supplemented by later data when available to us.[2] So far, however, as the English profession is concerned nothing comparable is available and on many matters, as will appear, we have had

[1] The various reports are conveniently summarised in Blaustein and Porter, *The American Lawyer*.

[2] The main sources are Liebenberg, "Income of Lawyers in the Post-war Period," in the *Survey of Current Business* (U.S. Dept. of Commerce) for December, 1956, at p. 26; and *Lawyers in the United States: Distribution and Income*—of which only Pt. I, Distribution, has been published as yet—(American Bar Foundation, December, 1956). The latter is based on three statistical reports for 1949, 1952 and 1955, prepared for the Survey by Martindale-Hubbell, Inc. These statistical reports are not available in England but their contents are conveniently summarised in two articles by Robert M. Segal, one in 24 *Harvard Law Record* (January 31, 1957) and the other to appear shortly in the *A.B.A. Journal* under the title of "A New Look at the Economics of the Legal Profession." The writers are most grateful to Mr. Segal for permission to make use of his summaries and for an advance copy of the second of his articles.

to rely upon our personal experiences and impressions supplemented so far as possible by information gleaned from colleagues and from the professional organisations. In this field, as in so many others, the fact that the English are not yet statistically minded is glaringly apparent.

It should also be made clear that Scotland and Ireland (both Northern Ireland and Eire) are excluded from this account[3]; England, for our purpose, means England and Wales. If these other countries were included it is probable that it would not significantly change the general conclusions here stated, but these countries have their distinct traditions and independent professional organisations on which the writers have no claim at all to speak with assurance.

One final preliminary observation. To cover the ground in the space at our disposal we shall have to indulge in broad generalisations. The general picture which we paint is believed to be a fair impression but it has no pretensions to detailed accuracy.

A. Organisation of the Profession

1. *The English Divided and the American Fused Professions*

It need hardly be said that the most important contrast of all is that the English distinction between barristers and solicitors is unknown in the States. There one qualifies as a lawyer and thereafter may be described quite indiscriminately as a member of the Bar, as a Counsellor-at-Law, as an attorney-at-law, or just as a member of a law firm, and may engage in any or all of the types of work which in England are undertaken either by a barrister or a solicitor. In England "Bar" is used only in relation to barristers. In America the word is used in connection with all legal activities; the entrant qualifies by passing Bar examinations, the professional organisations are described as Bar Associations and the word "solicitor"[4] is never used. This has often led to a tendency to compare the American legal profession with the English Bar, thus giving rise to an impression that the contrasts between the two professions are far more startling than they really are. The fact is that the American profession is broadly similar to the solicitors' branch of the English profession and that anything comparable to the English Bar is unknown in the States.[5]

[3] So are the Isle of Man and the Channel Islands.

[4] The profession of "proxy solicitor" is totally different; it consists of non-lawyers who are specialists in soliciting proxy votes in corporate disputes.

[5] The nearest approach is the "trial lawyer" who specialises in lower court work either in solo practice or as member of a firm. In some communities there seems to be a prestige distinction (unknown in England) between "plaintiffs' lawyers" and the less respected "defendants' lawyers." There are also specialists in appeal court work who (among lawyers) probably enjoy greater prestige than either class of trial lawyer.

No attempt can here be made to describe the details of the English division into two branches.[6] Basically it depends on two conventions: (1) that solicitors do not have a right of audience in the superior courts,[7] and (2) that, in general, barristers do not have a right of direct access to the lay client.[8] The result of these conventions is that solicitors are in the nature of general practitioners to whom the lay client goes in the first instance; barristers are specialists, primarily in advocacy and secondarily often in some particular branch of the law, whose services must be enlisted by solicitors if the matter involves litigation in the superior courts, and whose aid may be enlisted whenever specialist advice is needed.[9] This, however, does not mean either that barristers have a monopoly of advocacy or that there is no specialisation among solicitors. On the contrary, solicitors as well as barristers can, and do, appear as advocates in the courts in which the overwhelming bulk of civil and criminal work is undertaken, *i.e.*, the county courts and the petty sessional courts, and in the many new administrative tribunals which have sprung up in recent years. And many solicitors, especially those who practise in partnership, specialise in particular branches of the law. A solicitor's office bears some resemblance to that of an American law firm, though it is likely to be more old-fashioned and dusty and less mechanised. A barrister's chambers are still more old-fashioned: of course they have telephones and typists, and today some barristers even use dictating machines; but office organisation is minimal—most of the paper work being undertaken by the solicitor.

The English system has the advantage that a *corps d'elite* of specialist advocates is available to every litigant whatever lawyer in whatever town he may have consulted in the first instance. This is hardly true of the States. A lawyer in Oshkosh who doubts his

[6] This distinction, of course, prevails also in Scotland, Ireland, and many parts of the British Commonwealth. American readers who wish to explore it further will find a most helpful account in R. M. Jackson, *The Machinery of Justice in England* (2nd ed., 1953), which can be cordially recommended for further information on all the topics here discussed. An admirable historical account will be found in Ormerod, *British Civil Law*, a little book published by the British Council which should have appeared before this article is published.

[7] The High Court, the Court of Appeal, the House of Lords, the Judicial Committee of the Privy Council, and most Quarter Sessions.

[8] See the Bar Council's *Annual Statement*, 1955, p. 20. It is improper for a barrister to appear in court without being instructed by a solicitor; and, even in non-contentious matters, it is generally a breach of etiquette for him to advise anyone (except relatives, close friends and poor persons) without instructions from a solicitor.

[9] There is some temptation for the solicitor to enlist this aid, for he is liable for professional negligence whereas the barrister is not. To their credit solicitors generally resist this temptation—and are encouraged to do so because most clients do not take kindly to solicitors who are always running to counsel. The barrister's freedom from liability for negligence is alleged to be based on the absence of any contractual relationship between him and the client—a reason which is obviously inadequate. The absence of a contractual link precludes the barrister from suing for his fees, but this is not any true hardship as it will be professionally improper for the solicitor not to pay.

ability to argue a case before the U.S. Supreme Court can enlist the services of a specialist consultant in Washington and sometimes he does, but often he will feel it a matter of professional pride to handle the matter himself. Hence, it may well be, as many American observers have concluded, that the standard of advocacy is generally higher in England than in the States.

On the other hand, the English system means that a specialist has to be engaged, and paid, in every High Court case even though none is needed. There is little doubt that this is one reason for the high costs of litigation in this country.[10] This is aggravated by the further division whereby there are two ranks of barristers: juniors and Queen's Counsel (otherwise " leaders " or " silks "). A barrister who has been outstandingly successful may apply to the Lord Chancellor to be elevated to the rank of Q.C., and if his application is granted [11] he will cease to undertake some of the bread-and-butter work undertaken by juniors (such as appearing in county courts and settling pleadings) and hope to earn a better living in a rather less exhausting fashion. When a Q.C. is briefed, a junior must be briefed to appear with him and, by convention, the junior will be paid a fee equal to two-thirds of that paid to the leader. Accordingly, in the more important cases a minimum of three lawyers will be engaged (solicitor, junior and leader) and the fees payable to the junior, being proportionate to those of the leader, may be more generous than he could command if he handled the case without a leader.

2. *Professional Associations*

Each of the English branches has its separate professional organisations. The governing body of the solicitors is the Law Society, which has a number of statutory functions (for solicitors in contrast to the Bar are subject to detailed statutory regulations) relating to admissions, professional discipline and the like. The Society also administers an indemnity fund, financed by levies on all practising solicitors, to reimburse members of the public who suffer as a result of the misdeeds of the dishonest few.[12] There are also regional Law Societies which are purely voluntary bodies without statutory powers or duties. Membership of neither the Law Society nor a local society is yet compulsory, but approximately 83 per cent. of practising solicitors are members of the Law Society.

The traditional organs of the barristers are the four Inns of Court which are still responsible for admission to practice and for discipline. They retain their independent existence with an agreeable club-life, but have combined to form the Council of

[10] But *quaere* whether it is higher than in the States: see p. 344, note 14, *infra*.

[11] The grant is far from automatic and a barrister may have to apply many times before he is successful if he ever is.

[12] No such indemnity fund has been established in America though the matter is under active consideration in some states.

Legal Education which organises the qualifying examinations and lectures and classes for students of the four Inns. More recently a democratically elected General Council of the Bar has been established to deal with matters of general interest to the Bar as a whole, and, since the war, this has started to build up a secretariat. And there is now a Standing Joint Committee of the Bar Council and the Law Society which considers matters of interest to both branches of the profession—such as the forthcoming A.B.A. Convention.

The unified American profession permits of a somewhat simpler organisation. The American Bar Association is a voluntary organisation for the whole legal profession bearing some resemblance to the Law Society, but, it may be fair to say, distinctly more enterprising and active (especially in the field of law reform [13]). In addition to its Annual Convention, attended by several thousands,[14] it holds a number of Regional Meetings which are well attended also, and the various sections into which it is organised are in continuous operation making proposals for the improvement of the law and legal administration. In addition to the A.B.A. itself there are numerous State and City Bar Associations some of which are extremely active.[15]

An organisation, of which there is no English counterpart, is the American Law Institute, a product of the livelier interest in law reform to which reference has already been made. The Institute is responsible for the invaluable Restatements of the Law which are, perhaps, the English lawyer's favourite source of American law. It has also produced a number of model codes (*e.g.*, of Criminal Procedure and Evidence) and has interested itself in the field of continuing legal education—a field little explored in England.[16] Incidentally, the joint research—by judges, practitioners and law teachers—sponsored by the Institute is one of the reasons for the closer relationship prevailing in the States between the practising and academic sides of the profession. Another reason for this is the nature of the legal training which American lawyers undergo.

3. *Legal Training*

The contrasts in respect of legal education are to be discussed during the forthcoming Convention by a powerful team of speakers [17]

[13] Typical of its initiative is the Survey of the Legal Profession to which reference has already been made.

[14] The Annual Conference of the Law Society (which is the nearest equivalent) is normally attended by about 370.

[15] In some cases membership of a state bar association is an essential condition of the right to practise. The Bar is then described as "integrated."

[16] Refresher lectures for practitioners have, however, recently been instituted by both the Law Society and the Council of Legal Education.

[17] Dean Erwin Griswold and Mr. Homer D. Crotty will describe the American position, and Professor Arthur Goodhart, Mr. R. E. Megarry, Q.C., and Mr. E. R. Dew the English.

at the meeting of the Legal Education Section. Here we need only bring out the most salient contrasts which are essential for a proper understanding of what follows. Briefly, in America law school training has almost completely superseded apprenticeship; in England the main emphasis is still on apprenticeship.

Though the regulations differ somewhat from state to state the overwhelming majority of American lawyers now qualify by graduating (after a first College degree) at the Law School of a University, thereafter immediately taking a Bar examination and being admitted into practice. In England a university degree is in no sense a professional qualification. In the case of the Bar all that is needed to qualify to be " called to the Bar " [17a] is to " keep terms " at an Inn of Court (and " keeping terms " no longer has any educational significance) and to pass the examinations of the Council of Legal Education. To assist in passing these examinations, students can attend the lectures and classes of the Inns of Court Law School organised by the Council, but most (perhaps 59 per cent.) of those who intend to practise in England [18] instead combine keeping terms with reading law at a university. After call to the Bar most would-be practitioners then read in chambers to obtain the practical " know-how " by becoming pupils of a practising barrister. For this privilege they have to pay 100 guineas (£105) [18a] for a year's pupillage or 50 guineas for six months.[19] During the whole of this time they are unlikely to earn anything at all, and the out-of-pocket expenses (excluding living expenses) are likely to be in the neighbourhood of £200. Even thereafter, as we shall see, they probably will not earn enough to keep themselves for some years.

The requirements for admission as a solicitor are more stringent. The basic requirement is a period of apprenticeship (articles of clerkship), varying from three to five years, with a practising solicitor. This can sometimes be combined with reading for a university law degree but the minimum period of articles (three

[17a] Four times a year (once in each of the four law terms) there is a traditional ceremony in each of the four Inns of Court for the purpose of " calling to the Bar " those students of the Inn who have qualified themselves for admission to practise and wish to become barristers. At this ceremony each student is actually " called to the Bar " by one of the Benchers of the Inn. (The " Benchers " are the governing body of the Inn.)

[18] The vast majority of the pupils at the Inns of Court School are those who come from the Commonwealth countries of East and West Africa and the West Indies in order to qualify in England, intending to return to practise in their own countries. A considerable number of Englishmen also become barristers with no intention of practising; in industry and commerce the qualification " barrister-at-law " is afforded greater deference than the training may justify.

[18a] Equivalent, if converted at a rate of exchange more realistic than the official rate, to about $450.

[19] A pupil also pays a separate fee to his Master's clerk: the customary clerk's fee for a year's pupillage is 5 guineas, and the permitted maximum is 10 guineas (Bar Council's *Annual Statement*, 1953, p. 26). In recent years about 18 per cent, have dispensed with pupillage, which is optional.

years) is dependent on prior possession of a degree in laws, arts, or science and an increasing percentage of entrants (about 50 per cent.) in fact read for a law degree first. Unless they do this they must, during their articles, attend for at least a year at an approved law school. For this purpose those articled in London attend for two six-month courses at the Law Society's own law school and those in the provinces go to classes organised by the law schools of the provincial universities—an arrangement which is proving increasingly unpopular with both the Law Society and the universities. Admission is dependent on passing examinations of considerable difficulty—more difficult than those for the Bar.

During articles the clerk will not necessarily be paid anything; on the contrary, he may have to pay the principal a premium normally of 200 or 250 guineas. Happily this is increasingly coming to be recognised as anachronistic and, especially in London, it is now possible for a law graduate with a good degree to obtain free articles and often a small salary.[20] Even in other cases the whole or part of the premium may be repaid by way of salary in the later years of articles, and probably about half the articled clerks are paid something, at least during a part of their articles. Out-of-pocket expenses (in addition to any premium, but excluding living expenses) will be in the neighbourhood of £150.

In connection with the expense of qualifying either for the Bar or as a solicitor, it should perhaps be pointed out that in England most university students are now in receipt of State or municipal grants so that this part of the training presents less serious financial problems. In general, however, these grants are not available during the purely professional part of the training if this follows a university course and it is here that most students feel the financial rub, which is only slightly alleviated by the limited number of modest scholarships and bursaries provided by the Inns or the Law Society. In the States the problem is somewhat different. Once the student has graduated he can obtain a well-paid post immediately; he feels the pinch at the law school stage —and the fees of some of the non-State universities are very high indeed. Fortunately, labour is so well paid in the States that he can generally finance himself through college and law school by part-time work supplemented, perhaps, by loans which most universities will make and which he has no fear of not being able to repay out of his later earnings.

4. *Number of Lawyers*

According to the Survey of the Legal Profession in 1951 the number of American lawyers engaging in some form of legal work

[20] This may be merely pocket money of £1 or £2 a week, but may be something more adequate such as £7 or £8. The practice of paying salaries is a very recent development.

was 202,037, of whom 176,995 were in private practice.[21] Later figures for 1955[22] give a total of no less than 241,514, of whom approximately 190,000 were engaged in private practice. This means that there was one lawyer in private practice per 868 of population.

Comparable English figures can only be approximate. There are about 25,000 solicitors on the roll, but in the year 1955 only 17,966 took out practising certificates.[23] Many solicitors practising as assistants ("associates" in American terminology) or in legal work in industry or the government service do not need to take out certificates and there may be as many as 4,000 more who are engaged in legal work of some sort. Of those who took out certificates some 15,500 were in private practice. Perhaps 3,000 should be added for assistants without practising certificates, giving a total of solicitors in private practice of about 18,500.[24] The number of barristers engaged in some form of legal work in England is probably under 3,000 and the number in full time private practice has recently been estimated at 1,230.[25]

Hence, the total English legal profession seems to number about 25,000, and those in private practice can hardly be more than 20,000, or one lawyer per 2,222 of the population—little more than one-third of the American ratio.

5. *Types and Distribution of Legal Practice*

By convention, English barristers cannot practise in partnership.[26] Each carries on an individual practice, though a group shares a set of chambers, a clerk,[27] and a small secretarial staff.

21 Blaustein and Porter, p. 4.

22 See note 2, *supra*.

23 These are in the nature of annual licences to practise issued by the Law Society on application and payment of a small fee. Their issue is more than a mere formality to raise revenue, for they can be refused on various grounds and application must be supported by a declaration of compliance with the Solicitors' Accounts Rules.

24 We are indebted to the Secretariat of the Law Society for these figures.

25 These figures appear in a paper prepared by Mr. R. E. Megarry, Q.C. (to whom we are indebted for permission to use them), for presentation to the Legal Education Section of the A.B.A. during the Convention.

26 Young barristers may assist or "devil" for more senior colleagues in the chambers. The practice of paying for such devilling and even of guaranteeing a minimum return seems to be growing, thus producing something analogous to a class of paid assistants.

27 The position of a barrister's clerk is curious. The senior clerk in any set of chambers receives a separate fee in respect of each item of work done by any of his principals. This separate fee is paid, not by the barrister concerned, but by the client. The fees payable to the clerk are fixed by the Rules of the Supreme Court, and have been substantially unchanged for well over a hundred years. In ordinary cases they vary between a minimum of 2s. 6d. to 2½ per cent. on fees of over 50 guineas. Today barristers themselves generally pay their senior clerks additional "commission"; and the clerk in a busy set of chambers may make a substantial income—a few are said to earn £4,000 a year. For a fuller discussion of the position of clerks, see the Final Report of the Committee on Supreme Court Practice and Procedure Cmd. 8878 (1953), §§ 813 *et seq*.

Solicitors, on the other hand, may practise in partnership or as assistants. In the year 1955 of those who took out practising certificates, approximately 3,500 practised as individuals, 9,500 in partnership and 2,500 as assistants. As already pointed out the actual number of practising assistants is probably nearer 6,500. To those practising on their own we have to add 1,230 barristers giving a total of 4,730 solo practitioners, or approximately 23 per cent., as against about 46 per cent. in partnership and 31 per cent. as assistants. The position in the States is in startling contrast. According to the latest figures [28] nearly 70 per cent. are in solo practice and only 5 per cent. are assistants. The latter figure reflects the American practice of admitting into partnership soon after qualifying, whereas in England the young solicitor may have to wait more than ten years before he is taken into partnership. More unexpected is the high proportion of individual practitioners. The English lawyer tends to regard as typical of his American colleagues the vast New York law firm with the number of partners approaching three figures. Certainly American firms may be much larger than any known in England, where the law imposes an arbitrary limit of twenty on the permissible number of partners—a limit which at present only one firm has attained. But these large New York firms are un-typical; to a far greater extent than in England, the small-town lawyer practises on his own.[29] On the other hand, the percentage of American lawyers in solo practice is declining rapidly and among partnerships there is a tendency towards larger firms; there does not seem to be any marked change in these respects in England.

As would be expected, in both countries the major concentrations of lawyers are in the large cities but the English lawyers are grouped in one city to a greater extent than in the States. Nearly 30 per cent. practise in London [30] as contrasted with only 12 per cent. in New York City, and 20 per cent. in New York City, Chicago and Washington D.C. combined.[31]

6. *Lawyers not in Private Practice*

Of the lawyers not in private practice, the latest American figures [32] give 21,300 in government service, 8,000 in the judicial service, 15,063 salaried in private industry, 1,350 in educational institutions, and 234 doing legal work in other private employment. We have no exactly comparable figures for the English profession.

[28] See note 2, *supra*.

[29] This may not be wholly due to inclination but partly to inability to obtain openings with established firms.

[30] The only other cities with large concentrations are Manchester, Birmingham and Liverpool but all three combined have less than one-fifth of the number in London although there combined population is about 30 per cent. that of London.

[31] See Blaustein and Porter, pp. 4–8.

[32] See note 2, *supra*. These figures do not differ substantially from those obtained for the Survey; see Blaustein and Porter, pp. 8–10.

Statistics in the possession of the Law Society show that of those solicitors who took out practising certificates in 1955, 404 were in commerce, industry or a nationalised undertaking, thirty-seven in whole time central government service, 1,375 in municipal government and 309 in other whole-time employment. Each of these figures should probably be doubled to account for those who did not take out certificates, and for barristers (the number of whom in municipal government is negligible but appreciable in central government service and industry). Approximately 230 barristers and solicitors (mainly the former) are full-time teachers of law.[33]

The main contrast here seems to be in the relatively small number of English lawyers in central government. This reflects the lesser extent to which a legal training is regarded as a preparation for public service. And this is brought out even more clearly if we contrast the role of lawyers in politics.

From the seventy-first to seventy-fifth Congresses lawyers provided between 61 per cent. and 75 per cent. of the total membership of the Senate and from 56 per cent. to 65 per cent. of that of the House of Representatives. And since the beginning of the century lawyers have comprised a quarter of the membership of state legislatures.[34] In England the percentage of lawyers in the House of Commons since the war has been about 20 per cent. only.[35] Indeed, despite the training in public speaking which legal experience provides there is a widespread belief that to be a lawyer is a positive handicap towards the attainment of the highest political offices in England.

7. *Nature of Legal Work*

While in general the type of work undertaken by lawyers in the two countries is similar, a comparison between the *per capita* numbers of lawyers makes it clear that lawyers play a less pervasive role in England. In part this is accounted for by the less close relation between law and politics in a country which has no written constitution, for a rigid constitution, especially a federal one, tends to make all political problems legal ones. Hence, as we have seen, the greater role played by American lawyers in public life. But this alone cannot account for the whole of the

[33] They have their own professional body (the Society of Public Teachers of Law) which corresponds to the (much larger) Association of American Law Schools.

[34] Blaustein and Porter, p. 97.

[35] In October, 1956, according to figures supplied by the Secretary of the Bar Council, there were twenty-one solicitors and 101 English barristers among the 630 members of the House of Commons; and there were ten solicitors and sixteen English barristers in the House of Lords. Of the 101 English barristers in the House of Commons, forty-eight (or fifty if the Attorney-General and Solicitor-General are included) were holding themselves out as in private practice. Of course, the House of Commons includes members from Scotland and Northern Ireland, as well as from England and Wales; and, in addition to the 101 English barristers, there were at least two Scottish advocates (the Lord Advocate and the Solicitor-General for Scotland) and there may have been some members of the Bar of Northern Ireland.

difference. Of even greater importance, perhaps, is the more important part played by the American lawyer in industry and commerce. The "corporation lawyer," whether as a specialist in corporation law in private practice, or as a "tame lawyer" employed by a business corporation, has a dominant role in American commercial life to an extent unknown in England. Here, too, the specialist in company law enjoys considerable power and prestige but his status is far less elevated and he has far less prospect than his American colleague of attaining the presidency of one or more powerful corporations with the salary, retirement benefits and stock-options which go with it. Here the chartered (public) accountant is more likely to attain these heights. A most significant difference between the position in the two countries is the greater extent to which the English legal profession has abdicated in favour of the newer accountancy profession largely, perhaps, because the lawyers are only just beginning to realise the importance of tax matters.[36] We in England have at least avoided the unhappy disputes with the accountants which have recently come to a head in the States—but only at the cost of leaving the accountants in control of far more of the tax work.

Again, the English lawyer plays a far less important role in collective bargaining between employers and labour and in industrial relations generally. In the States this is an important and lucrative branch of legal practice; in England lawyers have been almost totally excluded from this field. Nor do we have anything exactly comparable to the "Washington lawyers"—lawyers formerly prominent in the government service who have left it for private practice. The nearest English approach is the ex-Income Tax Inspectors who become called to the Bar and practise as tax experts.

8. *Earnings*

It would take us too far afield to attempt to describe the exact method of assessing permissible remuneration for legal work. It must suffice to say that in America for most legal work (other than probate, workmen's compensation, and court-appointed work) it depends largely on free bargaining and upon what the market will bear. So, generally, does barristers' remuneration in England. Solicitors' remuneration, on the other hand, depends to a large extent on fixed statutory scales dependent, in conveyancing matters, on the value of the property concerned, and in other matters on the amount of work involved. Only recently, and still only in non-litigation and non-conveyancing work, has some measure of

[36] An American lawyer will find it difficult to believe that tax law does not figure at all in the Bar curriculum (though it does in the Solicitors') nor in that for the law degrees of any English university (though London University is about to introduce it). Company (Corporation) law also figures much less prominently than in the curricula of the American law schools.

flexibility been introduced so that remuneration can openly be graded according to the skill, specialised knowledge, and responsibility involved, the difficulty of the case, and the success and importance of the job.

The result is what matters for our purpose. And there seems little doubt that despite the fact that American lawyers are far thicker on the ground they yet contrive to be better paid.[37] The average net income of all lawyers in the States in 1954 is said to have been $10,220,[38] an increase from $9,375 in the year 1951.[39] Even among associates in law firms the average income was $7,800; this is not surprising since a graduate with a good record at one of the better law schools can expect to obtain a starting salary of $4,000–6,000 and to double it in about five years. Salaried lawyers in private industry were the highest paid group, with an average net income of $13,770, but those in government employment did little better than associates, with an average of $7,920 and without, of course, the same prospects as associates. Full-time law teachers averaged $9,000; in universities they are generally paid rather more generously than their colleagues in most other departments, since they are appointed to full professorships at an early age without having to rise slowly to the top of the academic pyramid. There were significant regional differences, the Middle East being the best paying area and the North-West the lowest. But the highest average for any state was California ($12,180) and the highest average for a large city San Francisco ($13,157) and not, as might have been expected, New York or Washington. To an ever-increasing extent lawyers rely for their income on business clients rather than on individuals. Peak earnings are not reached until after twenty-five years' practice, between the ages of fifty-five and sixty, and provision for retirement presents problems. The ratio of net to gross incomes of private practitioners is about 61 per cent.

In contrast with these detailed figures we can offer for England little more than inspired guesses.

Out of some forty junior barristers in eight leading sets of "common law" chambers who in 1953 disclosed their earnings to a special correspondent of *The Times*,[40] only one earned over £5,000 a year. Of the others six earned over £3,000, five between £2,000 and £3,000, and nine between £1,000 and £2,000. In these chambers the average earnings of juniors three years after call to

[37] Of course the figures quoted give little indication of the extent to which some American lawyers earn less than the bare minimum for subsistence. Whereas all English solicitors (as opposed to barristers) can be certain of earning a living, this is not true of the more crowded American profession.

[38] The median income (in some respects a more meaningful figure) was $7,830. To obtain a realistic equivalent in £s, English readers should divide the $ figures by 4·5.

[39] Blaustein and Porter, p. 14. The average was considerably less than that for physicians ($13,432) but more than that for dentists ($7,820).

[40] *The Times*, August 13, 1953, p. 7.

the Bar were under £250 a year. For juniors of five to nineteen years' standing the average was under £800 a year. For juniors of twenty years' standing and more the average was £2,700 a year. The overall average for the chambers (excluding the newly called) was £1,400. These were the figures for the best sets of chambers in the Temple in 1953, when there was still something like a boom in litigation. In other chambers in the Temple and Lincoln's Inn earnings were probably substantially less; and since 1953 there has been a general falling off in work.[41] Today the average barrister's earnings are probably lower than the figures quoted in this paragraph.

Of course averages are misleading. The rate at which barristers leave private practice, particularly during the first five years is high[42]; and averages give an unreal picture of the earnings of the sort of man who manages to stay in practice throughout his working life. Success comes quickly to some, and very slowly to others.[43]

Generalisation is impossible; but, after discussion with a number of junior barristers all called within the last ten years and in differing types of practice, we believe that the following is probably not unrepresentative.[44] Mr. X started practice[45] after one year's pupillage. In his first five years after pupillage, his receipts and expenses were as follows:

	Actual Receipts			Professional
	Own Practice	"Devilling"	Total	Expenses
	£	£	£	£
1st year	30	120	150	160
2nd year	150	150	300	200
3rd year	300	190	490	210
4th year	520	190	710	340
5th year	840	120	960	370

These figures are based on actual receipts; and because of the considerable delays in payment for work done, they give an inaccurate picture of the extent of Mr. X's practice at the end of five years. In his fifth year, when the actual receipts from his own practice were £840, Mr. X did work on his own account which,

41 *The Times*, July 10, 1956, p. 4, reporting speeches at the Annual General Meeting of the Bar.

42 It appears that over a quarter of those who start in practice leave within the first five years. Probably another quarter leave within the succeeding five years. Of the barristers who were called to the Bar in 1950–1951, 172 started to practise; and, by October, 1956, forty-nine of these (about 28 per cent.) had given up practice: see p. 331, note 50, *infra*.

43 One Q.C. today earning over £10,000 a year, earned only £200 in his first five years: *The Times*, August 3, 1956, p. 9.

44 Some of those with whom earnings were discussed did better than Mr. X during their first five years. Some fared worse.

45 Mr. X started practice in London. If he had started elsewhere, *e.g.*, in Manchester, his earnings during the first five years would probably have been considerably more for the competition is less keen in the provinces.

according to his clerk's estimate, was worth 1,120 guineas[46]; of this, about 300 guineas were in respect of appearances in court in twenty-eight different matters, and the balance was for paper work (opinions, conferences, drafting pleadings, advising on evidence, drafting legal documents, etc.).[47]

From the figures given for Mr. X's ordinary professional receipts it is obvious that a barrister, during his first few years of practice, cannot hope to support himself (still less support himself and his family, if he is married) by means of his professional earnings alone. To stay at the Bar he must have other resources: either parents willing to support him or private means of his own or the ability to earn money in his spare time. With modern rates of taxation and after sixty years of death duties, the number of barristers who, during the early lean years of practice, have no need to find outside work of any sort is probably today very small. The majority of young barristers do some outside work and we believe that a surprising number, during their early years of practice, manage to earn between £200 and £800 a year in addition to their ordinary professional income. The sort of outside work that can conveniently be combined with serious full-time attendance in chambers is not easy to find, is generally underpaid and, if it is to produce sufficient extra income, may leave the junior barrister with very little leisure.[48] Many young barristers give private tuition to students (particularly overseas students) reading for the Bar. A few spend their week-ends at Oxford and Cambridge as additional part-time tutors in law (*e.g.*, at colleges where the number of undergraduates reading law is too large for a single full-time don to deal with by himself, but too small to justify an extra full-time appointment). A few practising barristers have part-time lecturing appointments in other universities and at the Inns of Court School of Law and the Law Society's School of Law. But most of the lectures given by young barristers are given, in the London County

[46] The gap between the value of work done and actual receipts became even wider in the first six months of Mr. X's sixth year, when actual receipts were £630 and work done was worth 1,200 guineas; but in his sixth year Mr. X's experience obviously ceased to be representative.

[47] Mr. X does no criminal or divorce work and not very much county court work. A criminal lawyer of the same standing, and many barristers in general practice (*e.g.*, handling motor accident cases), would make many more appearances in court. The special correspondent of *The Times* in his article on August 13, 1953, suggested that a hypothetical barrister earning £1,000 might make sixty-six appearances in court and earn more than half his income from actual court work.

[48] A typical young barrister's receipts from outside work might be as follows:

	£
Marking examination papers	60
Evening School lectures (6 hours a week)	200
Writing articles for legal periodicals	30
Editorial and other work for law publishers	100
	£390

Council's Evening Institutes, to evening students preparing for the many professional examinations in which some legal knowledge is required.

By the end of his fifth year of practice the man who has succeeded in staying at the Bar has probably discarded, or is about to discard, most of his "outside" work: his practice, though still by any standards not well-paid, is now keeping him fully employed. By this time, too, the young barrister has acquired quite substantial practical legal experience; and, if he is lucky, he may receive some quite tempting offers of full-time employment in business or commerce. Such offers may be the more tempting because, as a full-time employee of a commercial firm, the young man can look forward to shorter hours, less grinding hard work, greater security of income and better provision for sickness and old age.[49] Indeed, the leaders of the Bar are today very much concerned both about the falling numbers of those who set out to practise[50] and about the high quality of those who leave the Bar in the first five years or so of practice.[51] A profession which cannot provide its young men with sufficient income during their first years of practice can no longer expect to obtain new recruits of the same number and quality as have always been available in the past.

Earnings of barristers after the first five years of practice vary so widely that generalisation is almost impossible. For the great majority financial progress is slow. We have already mentioned that, in leading common law chambers, the 1953 average earnings for juniors of five to nineteen years' standing were less than £800 a year.[52] In general practice,[53] whether in common law chambers in the Temple or in Chancery chambers in Lincoln's Inn, it really is difficult to acquire a junior practice producing more than £3,000 a year, and very few juniors earn over £5,000 a year.[54] It is most unlikely that any junior earning £5,000 a year has less than ten years' standing and most of those who eventually earn at this rate find the long hours, the pressure of work and

[49] In 1956 it was said that nearly half the more promising younger members of a flourishing set of chambers in the Temple had left for a more hopeful future in commerce: see *The Times*, August 3, 1956, p. 9.

[50] 172 of the barristers called in 1950–1951 started to practise in England but forty-nine had ceased to practise by October 1956. Of those called in 1953–1954 only 124 started to practise in England, and of those called in 1955–1956 only twenty-nine have yet done so but doubtless others will after they have completed military service: see The Bar Council's *Annual Statement*, 1956, p. 44.

[51] See note 42, *supra*. This is particularly alarming because the judges are all appointed from the practising Bar.

[52] See p. 329, *supra*.

[53] In very specialised practice, *e.g.*, in chambers dealing almost exclusively in tax law or company law or patent law, the financial rewards are generally higher.

[54] See p. 328, *supra*. In 1953 only one out of forty juniors in eight prosperous sets of chambers was earning over £5,000 a year.

the responsibility a strain which cannot be allowed to continue for many years. Most successful barristers reach the peak of their earning powers after many years of practice and stay precariously at the peak for a few hectic years only. Over a lifetime the net earnings of even the luckiest and most successful are modest.

One of the reasons why junior barristers are relatively underpaid is that the fees for paper work and for all the preparatory work before a case is heard in court have not increased so as to keep pace with the increased cost of living.[55] Another reason is "the bargaining power of solicitors, on whom counsel is dependent for work"[56]: in a fiercely competitive profession an attempt by one barrister to raise his fees may have the effect of driving the work elsewhere.[57]

So far as work out of court is concerned, it is generally true to say that a junior barrister who is not in specialist chambers can increase his income only by doing more work; and, even by working long hours at nights and at week-ends, there is a physical limit to the amount of paper work that one man can get through.[58]

The largest legal incomes are made by a tiny number of Q.C.s; and, once a junior is really well established, he will consider applying for "silk." Taking silk is an important and hazardous step: hazardous, because a busy and successful junior may have no success at all as a Q.C.; and many who are eventually successful suffer a severe loss of income immediately after "appointment to the rank of Queen's Counsel." From time to time some brilliantly successful junior takes silk after only ten years of practice. More commonly the step is taken after fifteen to twenty-five years of practice or even later.[59] With modern rates of taxation the newly-appointed Q.C. is unlikely to have accumulated out of his earlier

[55] See the Bar Council's *Annual Statement*, 1955, p. 9; and an article in *The Times*, July 31, 1956, p. 6, which says that where after the trial of an action the successful party's costs are "taxed" by the Taxing Master (an official who decides, in effect, what legal costs incurred by the successful party are to be paid by the loser), the fees allowed for preliminary and interlocutory work done by counsel have shown "very little upward trend, at least in living legal memory." An overall increase of 100 per cent. in fees for juniors' interlocutory work is expected to come into operation shortly: see the Bar Council's *Annual Statement*, 1956, p. 29.

[56] See *The Times*, July 31, 1956, p. 6.

[57] The most recent collective increase in fees was on January 1, 1952, when the minimum fee was raised from one to two guineas. This is still criticised by some barristers' clerks. They say that, before the change, when the fee for up to half an hour in conference was only one guinea, many solicitors often walked into chambers to see what counsel would say about quite trivial points. After January 1, 1952, this free-and-easy attitude to conferences seems to have stopped. The principal sufferers are the very junior barristers.

[58] A few grey-haired juniors in general chancery practice may earn more than £5,000 a year without frequently appearing in court; but to do so calls for great industry and a remarkable capacity to get through the work quickly, as well as a widespread reputation among solicitors.

[59] Of the sixteen new silks (including one woman) appointed at Easter, 1957, the most senior was called to the Bar thirty-two years ago; the most junior was called sixteen years ago; and the average standing of all sixteen was twenty-three and a half years from call.

earnings as a junior any considerable savings to provide a "cushion" during his early days as a silk; and the modern tendency is to take silk later than in the past. At the same time many who are otherwise suitable now decide that they cannot afford to take the risk, and do not apply for silk.

It is believed that there are about 180 silks [60] in practice; but not all of these can be regarded as full-time practitioners, and our guess is that the number of silks in effective full-time practice is about 130. Their earnings vary as widely as those of juniors. Some make little or nothing. Many probably earn between £3,000 and £5,000 [61]; and there are some exceptional and fashionable silks who make over £10,000 a year. One or two may make as much as £25,000 in a phenomenally good year.[62] In recent years Sir Hartley Shawcross, Q.C., was undoubtedly making more than any other practitioner at the Bar. On his retirement from private practice, he was credited in the newspapers with having earned in some years as much as £50,000. When approached he would neither confirm nor deny this figure. It is interesting to note that in his fourth year at the Bar, Sir Hartley Shawcross made only £130, and that his effective career in private practice as a Q.C. lasted only five and a half years.[63]

It would be wrong to conclude this general survey of earnings at the Bar without emphasising that except for the very few the financial reward is meagre, and that for everyone the rewards are uncertain and dependent on good health and constant application. But a career at the Bar has many special attractions. One of them is the fact that the judges of the superior courts and the county courts are all appointed from the ranks of practising barristers.[64] Appointment to the Bench is not only a great distinction; it is also financially worthwhile.[65]

[60] This is Mr. Megarry's figure, see note 25, *supra*.

[61] Two barristers' clerks after some informal discussion with their (very reticent) colleagues both guessed that about half of the silks in effective full-time practice earn £5,000 or more. But *quaere*.

[62] See *The Times*, August 13, 1953, p. 7.

[63] *i.e.*, from Autumn, 1951 (when his political party went out of office and he ceased to be a Minister of the Crown), until early in 1957, when he retired. Sir Hartley Shawcross was called to the Bar by Gray's Inn in 1925; took silk in 1939, a few months before the outbreak of war; was Attorney-General, 1945–1950 and President of the Board of Trade, 1950–1951. He has been an M.P. since 1945.

[64] Moreover, without leaving private practice, a barrister (Q.C. or junior) may obtain a part-time judicial appointment as Recorder or as Chairman or Deputy Chairman of Quarter Sessions. There are 102 Recorderships and over sixty Quarter Sessions (not all of them with paid chairmen or deputy chairmen); and there are many other public legal appointments which, by law or according to general custom, are available only to barristers.

[65] A High Court judge is now paid £8,000 a year and is always made a Knight. If he becomes a Lord Justice of Appeal, he is sworn a member of the Privy Council, which makes him "Right Honourable"; and if he is appointed a Lord of Appeal in Ordinary (sitting in the House of Lords), he is made a Baron.

Nevertheless, in recent years, the Bar has become less and less attractive. This is shown not only by the diminishing number of the new recruits but also by the increasing number of really distinguished barristers who leave the Bar for well-paid appointments in the City and in business. For those who believe that they have little chance of being appointed to the Bench, the preference for the City and for business is understandable: the hours of work are almost certainly much less, the income is less precarious and there is almost certainly a pension. The employee of a business concern has usually less cause than a private practitioner to worry about providing for sickness or for his old age; generous tax concessions ensure that he is provided with pension rights at a minimum cost to himself and his employers. Until the Finance Act, 1956, barristers in private practice (whose practice is intensely personal and who have no goodwill to sell when they retire) viewed with helpless envy the pension rights of their employed brethren under so-called "Top Hat" pension schemes. The Finance Act, 1956, made some very substantial concessions to the private practitioner [66]; but in this respect the position of the private practitioner still compares unfavourably with that of the employed lawyer; and we think that the trend in favour of employment instead of private practice is likely to continue.[67]

We cannot speak with much greater precision about the earnings of solicitors.[68] Having qualified, most entrants to the profession start as employed assistant solicitors. At present they can hope to receive a salary of about £600 in the provinces and rather more in London. Some time within five to ten years (when they are likely to be earning in the neighbourhood of £1,000) most will be taken into partnership or will set up in practice on their own. If they remain as employed assistants in private practice they are not likely ever to rise above £1,500. On obtaining a partnership—which may initially be on a salaried basis—their earnings are likely to rise gradually, especially if they are taken into partnership in an established firm, but unless they have capital to bring into the partnership they will normally be expected to contribute to capital out of their share of profits so that, for some time, their actual drawings may be no greater than before.[69]

Figures in the possession of the Law Society relating to the year 1950 suggest that approximately one-third of solicitors in

[66] S. 22 of the Finance Act, 1956, allows full tax relief for premiums paid under approved pension annuity contracts, provided the annual premium does not exceed £750, or 10 per cent. of income before tax (whichever is less).

[67] It will not be surprising if one of the results of this is to produce a more general English equivalent of the American "house counsel."

[68] Some useful material is given in the *Financial Times Careers Supplement* for November 12, 1956.

[69] It is traditional in England for solicitors to carry a fairly substantial liquid capital.

private practice earned more than £2,000, one-third between £1,000 and £2,000 and the remaining third under £1,000, and that the overall average was somewhere below £1,700.

In 1955 a distinguished American economist [70] interviewed and obtained information about their earnings from 188 solicitors selected at random from those practising in London and certain selected rural areas. The income distribution which he obtained [71] showed that fifteen (8 per cent.) were earning under £1,000, seventy-three (39 per cent.) were earning between £1,000 and £2,000, forty-three (23 per cent.) between £2,000 and £3,000, twenty-six (14 per cent.) between £3,000 and £4,000, and thirty-one (16 per cent.) over £4,000. Five (2·8 per cent.) stated that they were earning £10,000 or over. These figures probably give a more favourable picture than would be true had the sample been spread more evenly over the country as a whole. We should be surprised if the overall average is as high as the present average remuneration of general medical practitioners under the National Health Scheme (£2,200),[72] whose remuneration is likely to be substantially increased in the near future.

There is little doubt that English lawyers, like their American colleagues, rely increasingly on business clients rather than individuals, and it is probable that they, too, attain peak earnings after about twenty-five years' practice. The American percentage for overheads of only 40 per cent. would be regarded with envy; in England it is probably over 60 per cent. in most cases; but, of course, the two figures are not strictly comparable because an English firm is likely to have a much higher proportion of paid assistants. Retirement has not presented quite the same problems as it has in the case of the Bar, for solicitors have a business or a share in it to sell when they retire but they, too, will welcome the recent tax concessions regarding retirement benefits for the

[70] Professor George Break of the University of California, Berkeley, to whom we are indebted for permission to quote these figures.

[71]

Professional Income	Number
below £500	1
500 — 749	6
750 — 999	8
1,000 — 1,249	14
1,250 — 1,499	24
1,500 — 1,749	12
1,750 — 1,999	23
2,000 — 2,499	24
2,500 — 2,999	19
3,000 — 3,999	26
4,000 — 4,999	13
5,000 — 9,999	13
10,000 and over	5

[72] According to a recent public opinion survey, 68 per cent. of those who left school at fourteen consider that general medical practitioners *should* earn more than solicitors; but the percentage dropped to 50 per cent. in the case of those who left school at fifteen+: see *The Lancet*, May 11, 1957, at pp. 981 *et seq.*

self-employed. In fact most solicitors seem to die in harness at a ripe old age.

As with American lawyers, the increasing number of solicitors in industry and commerce (including the nationalised undertakings) probably have the highest average incomes coupled with generous pensions. And those in the government service seem to do rather better (relatively to the profession as a whole) than in the States. After a probationary period of one or two years they will start as legal assistants at a salary scale of £1,085 to £1,475 and may rise through Senior Legal Assistant (£1,500–£2,000), Assistant Solicitor (£2,100 to £2,600), perhaps attaining the post of Solicitor or Legal Adviser to a major government department at £4,250, once again with pension rights. The scales for solicitors in municipal government start rather lower, but there are more vacancies for the senior posts of Town or County Clerk, some of which are paid even more than the top salary in central government.

Law teachers at universities, who may have qualified as either barristers or solicitors (or neither), are paid on the same scales as in other Faculties—in England it is only the medical profession which has obtained a professional differential. The effective range is now from £550 to £2,500 but, as from August 1, 1957, it will be from £700 to £3,000. Most teachers can supplement their salaries slightly by examining, broadcasting, and from royalties from their books, but only a small proportion ever reach the top of the salary scale.

As we have seen, the American lawyer is less well paid than the physician but better paid than the dentist[73]; there is little doubt that the English lawyer is paid considerably less than either.

9. *Women Lawyers*

> "When it comes to women who enter the law, the majority of large law offices still refuse (short of war) to interview them for jobs . . . Women must work twice as hard as men for half the pay. And so far there have been relatively few women—although the number is steadily increasing—who have won positions of real distinction in practice, in legal service to the government or on the Bench."

Thus spoke Professor Barbara Armstrong, herself an exception to the rule which she enunciated,[74] about the position in America in 1951.[75] The position does not seem to have materially changed since; the nation's Portias are still the Cinderellas of the American legal profession, and constitute a very small proportion of it (said

[73] This may no longer be so for, by 1951, dentists were rapidly closing the gap: see Blaustein and Porter, pp. 14–15.

[74] Professor Armstrong is a distinguished member of the Faculty of the Law School of the University of California at Berkeley.

[75] Quoted in Blaustein and Porter, pp. 27, 28.

to be 2·48 per cent. in 1951 [76]). Many of these are employed in government agencies where they seem to find it easiest to obtain employment.

In this respect England seems to be slightly more progressive. Here, too, there have been "relatively few women who have won positions of real distinction" but many have proved highly successful as solicitors in private practice and in the government service. They may find it more difficult to obtain employment but it is certainly not true that nothing short of war will secure them an interview for a vacant post. They seem to have made rather less impact at the Bar,[77] but three have attained the distinction of becoming Q.C.s [78] and one has become a Metropolitan Police Court magistrate. But, rather to our surprise, we find that the percentage of women in practice either as barristers or solicitors may be even smaller than in the States (about 2·1 per cent.).[79] As in the States there are a number of women in law teaching, but none has yet attained the rank of full professor [80] as several have in the States.

10. *The Judiciary*

The most conspicuous contrast here is in the number of professional judges in the two countries. In the States there are about 8,600, or approximately 3·2 per cent. of the whole profession. In England the vast majority of our judges are laymen acting as magistrates on a part-time unpaid basis. And many of our judges who are legally qualified act only on a part-time basis as recorders and chairmen of quarter sessions. The total full-time professional judges is under 300 [81] or about 1·2 per cent. of the whole profession.

Another great contrast is in the extent to which politics plays a part in the selection of judges. In the States it still plays a major role whether the judges are appointed or elected, and election by popular vote still prevails in more than two-thirds of

[76] But later figures (see note 2) give only 1·3 per cent. This, however, is probably less reliable, since a lawyer was tabulated as a man unless listed as "Miss" or "Mrs." or unless the name was unmistakably feminine.

[77] The first woman barrister was called to the Bar by the Inner Temple in May, 1922.

[78] One of whom is a Recorder, *i.e.*, a part-time judge presiding over borough Quarter Sessions.

[79] In 1955 there were only 528 women on the roll of solicitors of whom 335 took out practising certificates. The total number of women called to the Bar is unknown. The Secretary of the Bar Council has told us that there are sixty-eight women barristers in private practice; but we think that probably not more than two-thirds of these are in effective full-time practice.

[80] But one has in Eire.

[81] It is difficult to give an exact figure since many court officials (*e.g.*, Taxing Masters and their Principal Clerks and County Court Registrars) perform partly judicial and partly administrative functions. The figure of 300 includes Taxing Masters (but not their Principal Clerks) and the seventy-three full-time County Court Registrars. The function of the Taxing Master is to adjudicate on bills of costs mainly to determine how much the loser shall pay towards the winner's costs: see *infra*, p. 344, note 13.

the states.[82] The Bar Associations have done their best to mitigate the worst features of a system under which a judge periodically fights an election, often on a party ticket,[83] but in the opinion of many qualified observers it still constitutes the chief obstacle towards decent judicial administration.

In England all the judges are appointed. This, of course, does not necessarily mean that politics plays no part in their selection. It certainly does to some extent in the selection of those American judges who are appointed, and formerly it did so in England too. But experience over the last twenty-five years suggests that it has now been eradicated almost completely in the appointment of full-time judges in England.[84]

Because of the smaller numbers of English judges and because of the method of selection, it would be expected that the over-all standard would be higher. We have little doubt that this is so.[85] On the other hand, it must be emphasised that English judges are selected from a very small section of the profession, since nearly all the worthwhile appointments are open only to barristers in private practice and not to solicitors.[86] Hence, the quality of county court judges and stipendiary magistrates has not always been high, and there have even been some disappointments on the High Court Bench. Dismissal of an unsatisfactory Supreme Court judge is impossible; he can only be removed as a result of an address of both Houses of Parliament (which has only happened in one case when in the early nineteenth century a judge in Ireland was removed) and there is no retiring age. A county court judge retires at the age of seventy-two with possible extensions to seventy-five and is removable for misconduct or (theoretically) for inefficiency.

Having regard to the diversity of practice among the various jurisdictions in the States no meaningful comparisons can be drawn as regards judicial salaries. But American readers may like to know that as a result of recent increases Supreme Court judges are quite generously paid; they enjoy salaries of £8,000 per annum

[82] Blaustein and Porter, p. 145. One of the consequences of this system is that former judges return to private practice, which never happens in England.

[83] By "approving" certain candidates and by fighting with some success for a gentleman's agreement that a judge who has proved successful shall be returned unopposed.

[84] One relic of the past is the alleged rule that the Attorney-General has a right to a vacant High Court appointment and especially to the office of Lord Chief Justice. We may know shortly whether this rule still prevails. Strangely enough, politics still enters largely into the selection of unpaid magistrates; it is generally impossible to be appointed to the local bench unless one's name is put forward by one of the political parties.

[85] But if the average standard is higher and if no English judges are quite so bad as the worst of the American it is probably true that the very best American judges are even better than any that England has recently produced.

[86] Who are eligible only for the posts of Chancery and Taxing Masters and County Court Registrars.

with excellent pension rights.[87] But county court judges, with jobs which in some respects are more difficult and no less responsible, have, until now, been grievously underpaid at £2,800,[88] (admittedly with pensions). The extent to which England relies on unpaid and underpaid judges is remarkable.

B. Practice and Procedure

Having regard to the wide variations of practice as between the various states in America it is difficult to be specific on this aspect of our subject. Nevertheless, there are certain features which strike any English observer of the American scene and any American observer of the English.[89] Among these the following may be mentioned.

1. *The Jury*

America has not only retained the Grand Jury in criminal cases but also the petty jury in civil as well as criminal cases.[90] The fact that the normal civil proceedings, such as motor accident cases (which in both countries constitute so large a part of current litigation), are heard before a jury astounds an English lawyer who is accustomed to a system whereby the civil jury is a very rare occurrence,[91] and where its disappearance is regarded as one of the great legal reforms of the century. Its retention in the States undoubtedly accounts for many of the subtler distinctions between the habits of the two professions; for example, to the very different type of forensic eloquence displayed by trial lawyers. In the States it is still common to hear real old-fashioned harangues, *à la* Sjt. Buzfuz, which have long since passed into disuse in England. On the whole, the English advocate gets his effects by under-statement, the American by over-statement. In the States, too, there is a stricter observance of the technical rules of evidence, especially as regards what questions may be asked. An American trial lawyer will not consider that he has earned his fee unless he punctuates his opponent's examination of witnesses by objections to the questions he is asking. In England this is done seldom and circumspectly even in those cases where there is a jury.

[87] Rights which tended to be conveniently forgotten during the agitation which led to the recent increases.

[88] Less than is now received by a High Court Master. An increase in county court judges' salaries from £2,800 to £3,750 has recently been announced, but it may be that there is still too great a discrepancy between their salaries and those of High Court judges.

[89] A most interesting discussion of the contrasts in respect of criminal proceedings will be found in an article by J. C. Smith, "The Personnel of the Criminal Law in England and the United States" in (1955) Camb.L.J. 80.

[90] It is, however, becoming increasingly common for the parties to waive their right to a jury.

[91] In practice a jury is never used in the county court and in the High Court only in actions for defamation, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and actions in which there is a charge of fraud (and not always then).

Not only is a jury far more common in the States, but where there is a jury the role of the judge during the trial is far less important than in an English case heard with a jury. In England the judge's summing up is not limited to directions on the law but reviews the whole of the evidence. At the very least this minimises the effect of emotional appeals in counsel's final speeches [92] —which invariably precede the summing up and never follow it as occurs in some jurisdictions in the U.S.A. Often it goes considerably further and means that the jury is subtly influenced towards returning a verdict favoured by the judge. Such a wide-ranging summation would be regarded as highly improper in the States; there the judge's role is limited to directions on the law and often he will do no more than read to the jury instructions agreed by the two parties. It certainly seems to English lawyers that the Americans, having saddled themselves with the incubus of the jury, have gone out of their way to ensure that the system operates with the maximum disadvantage.

There are also startling contrasts as regards selection of the jury. In the States, especially in criminal cases, days or even weeks [93] may be occupied while each side catechises the jurors and exercises its rights of challenging them until a jury acceptable to it has ultimately been selected. In a heterogeneous community selecting the "right" jurors is regarded as more than half the battle. In England each side accepts the jury provided, and challenges, except for obvious causes (such as acquaintance with the parties or their lawyers), are unheard of. Equally unheard of here is the American habit of finding out what has taken place during the deliberations in the jury room. Accounts of the jury's discussions are frequently reported in the American newspapers and it is not uncommon for the parties' lawyers themselves to question jurors in order to improve their trial technique by learning what arguments proved persuasive, or even in order to find a possible ground for an appeal.[94] In England it would be regarded as the gravest professional misconduct for any lawyer to attempt to invade the secrecy of the jury room and it might be contempt of court for them or a newspaper to do so. This leads us conveniently to another contrast.

2. *Pre-Trial Publicity and Press Reports*

In any sensational American criminal trial anyone who reads the press, watches television or listens to the radio is likely to

[92] This may also explain the more restrained forensic style adopted by English advocates even in jury cases.

[93] The extent to which this goes on varies between different parts of the country and it is only in a sensational case that days or weeks would be occupied in this way.

[94] A Texan trial lawyer told one of the writers that he would regard himself as having failed in his professional duties if he did not extract this information from the jury: and this feeling (though far from universal) is not restricted to Texas.

know before the trial what the prosecution hope to prove and (more serious still) details of the accused's background and former convictions (whether admissible in evidence or not).[95] And during the course of the trial the newspapers do not hesitate to express their views of the guilt or innocence of the accused.[95a] This scandal of "trial by newspaper" is not wholly unknown in England because of our habit of hearing in public the preliminary investigations before the magistrates[96] and allowing full reports of these hearings to be published.[97] But at least we restrict publication to what is actually put in evidence (without comments on its effect) and publication until after the trial of any other material is a serious contempt of court.[98] No English newspaper would dare to publish anything approaching the sensational titbits which are commonplace in the States, and English editors have been sent to prison for publications which the most respectable of American editors would regard as models of restraint.

What is perhaps more disturbing is that in the States this abuse is sometimes connived at by the police and lawyers (who hand out press releases) and by the judges (who rarely attempt to restrain them). The organised profession is alive to these evils,[99] but hitherto attempts to curb them have been successfully met with the arguments that the freedom of the press must not be curtailed and that the protection of the individual demands that law enforcement functions in the fierce light of publicity. Precisely the same arguments are raised in England when it is suggested (as at present) that we should conduct preliminary inquiries *in camera*. There is little doubt that in both countries the interests of the individual have been sacrificed to the public's thirst for sensation and that the freedom of the press has been confused with licence. But these abuses have gone much further in the States than in England. On the other hand, the English restraint in criticising decisions after they have been handed down may go too far.

3. *Professional Ethics*

Attention has already been drawn to a number of respects in which ethical practices differ in the two countries. In fact the

[95] Thus a headline "Sex Maniac Arrested in Bronx Murder" would be quite normal.

[95a] Considerable pressure is at present being brought to bear to allow press photographs to be taken in American courts during trials.

[96] And, where applicable, before the coroner's court.

[97] They do things better in Scotland, where the preliminary inquiries are in private, and in Northern Ireland where the magistrates may (and do) direct that there shall be no publication. Even in England there is a statutory power to take the preliminary hearing *in camera* but hitherto this has hardly ever been exercised. As a result of the recent *Adams* case the practice may change: see *infra*, p. 387.

[98] Thus, after the *Adams* murder trial the English distributors of *Newsweek*, a highly respectable American periodical, were fined for contempt in respect of the comments on the trial contained in the periodical. *R.* v. *Griffiths* [1957] 2 W.L.R. 1064.

[99] See Blaustein and Porter, pp. 270 *et seq.*

main difference in this respect is not so much between the ethical rules themselves as between the ways in which they are formulated and the extent to which they are observed. The main difference in the content of the rules is that the American are not concerned with those which in England regulate the relations between the two branches. Some of the latter are surprising to American eyes; for example, the rule that the barrister himself must not interview the witnesses (other than experts and the client himself). There may be some force in the comment of an American critic that this rule destroys one of the main advantages of having a specialist corps of advocates.[1]

The other main contrast is that handling an action "on spec" is utterly unprofessional in England, whereas payment by "contingent fee" is permissible and common in the States. The subtle difference which this makes to the whole mental outlook of the two professions can scarcely be exaggerated.

So far as formulation is concerned the American practice is in advance of the English. The rules are set out in two codes adopted by the A.B.A.—the Canons of Professional Ethics and the Canons of Judicial Ethics. The former has been formally adopted by the Bar Associations of most states; the latter has received less widespread formal adoption but is generally recognised as providing an accepted standard. In contrast the English rules consist largely of unwritten conventions and of rulings and decisions by the professional bodies—another manifestation, perhaps, of our characteristic antipathy to written constitutions. But the English rules seem to be observed more strictly than the American. Thus, "ambulance chasing" is said to be a common practice in a substantial proportion of states [2] but has now been almost, if not completely, eradicated in England.[3] And, as already pointed out, press releases by district attorneys are common despite the fact that they are generally forbidden by Canon 20 of the Code of Professional Ethics. In this connection it must not be forgotten that not all states have integrated Bars with compulsory membership of the Bar Association. In England every barrister has to be a member of an Inn and every solicitor is subject to the jurisdiction of the Disciplinary Committee whether or not he is a member of the Law Society. This, and the fact that the English profession is much smaller and closer knit, undoubtedly facilitate the maintenance of proper standards.[4]

[1] But for an attempted justification see Ormerod: *British Civil Law.*

[2] Of twenty-five states who reported on this to the Survey of the Legal Profession, nine said it was a common practice and only two said it was non-existent: Blaustein and Porter, p. 247.

[3] Its death-knell was rung by the Legal Aid Scheme. But unqualified "claims assessors" still continue to make a good living despite this scheme.

[4] It is often said that the divided profession aids in the maintenance of high professional standards, but the writers suspect that it may have the oppposite effect.

4. *Legal Aid for the Indigent*

Here England may now claim to be in advance of our American colleagues. Since the implementation in 1950 of the legal aid scheme set up under the Legal Aid and Advice Act, 1949, we have a nation-wide scheme financed by the State whereby, in criminal cases, advocates are provided free for all those who need it and, in civil cases, legal representation is available to the poorer section of the community [5] on payment only of what they can afford.[6] This scheme is now in operation in all the regular law courts except in domestic disputes before magistrates and the principal step needed to bring it into full operation is the creation of the Legal Advice Centres where advice short of assistance in impending litigation can be obtained.

This scheme has not had too good a press in the States, where all too often it has been damned as "Socialised Law." One contribution towards Anglo-American understanding which the English lawyers at the Convention can make, is to point out to their American colleagues that the operation of the scheme is entirely in the hands of the organised profession who have lost none of their independence by participating therein. Indeed, a criticism which is often, if unfairly, made is that the lawyers have benefited more than the public. That the lawyers have indeed benefited is clear, for they now get paid, adequately if not always in full,[7] for the work which they do and run no risk that the client will default. But it is clear that the public have also gained greatly [8] and that the scheme is a highly successful and surprisingly inexpensive [9] social service.

In contrast, the American provisions are primitive, though improving. The Survey of the Legal Profession reported that only 55 per cent. of the need was being met and that in 38 per cent. of the counties no help whatever was provided except privately through the charity of individual lawyers.[10] Since then there has been a further improvement, especially in criminal cases, thanks partly to the influence of the U.S. Supreme Court in ruling that adequate legal representation is an essential feature of procedural due process.[11] In civil cases it is only fair to emphasise that the practice of taking up cases on a contingent fee renders the need

[5] Those in the middle income brackets are not within the scheme despite the fact that few of them are able to face the cost of High Court litigation.

[6] Unfortunately the basis of assessing contributions from aided litigants has not been adjusted to the rise in the cost of living since 1950 with the result that in some cases the amount of the required contribution is greater than the applicant can really afford.

[7] In High Court cases their fees and profit costs are reduced by 15 per cent.

[8] In the five and a half years to March 31, 1956, 102,666 civil cases have been won by assisted litigants. The majority of these were divorce cases but nearly £9m. has been recovered as damages in other types of litigation.

[9] The grant in aid to finance the civil scheme was £1,375,000 for the year 1955–1956.

[10] Blaustein and Porter, p. 67.

[11] See Wm. M. Beaney, *The Right to Counsel in American Courts* (1955).

somewhat less acute than in England where, as already pointed out [12] this is professionally improper. Similarly, the fact that generally in the States the loser does not have to pay the winner's advocates' fees (as he does in England [13]) makes the burden of the costs of litigation seem less severe.[14]

5. *Trial Procedure*

We conclude with a few general observations on the contrasting features of an American and an English trial. American lawyers must reconcile themselves to the fact that most Englishmen's impressions of an American trial are derived from the films and that we visualise an undisciplined slanging match between judge, counsel and witnesses. In fact, of course, the average American trial is quite as dignified and orderly as, say, any English county court case. What is true is that it lacks the perhaps excessive awesomeness of an English High Court trial and that an American judge is not treated with the same, almost sycophantic, deference as is his English brother, and is less likely to forget that he is a fallible human being. Apart from this the main superficial contrasts are few: the fact that counsel are unrobed and prowl around when examining witnesses or addressing the jury instead of staying rooted to one spot, the presence of the Stars and Stripes instead of the Royal coat-of-arms, and the absence of the law books and reports which line the walls of an English court-room.

This last contrast, however, reflects an important difference in procedure. Legal argument, in the States, is mainly written; whether in trials at first instance or in appeals the lawyers hand in written briefs to the judge and are only allowed a very short time (usually as little as half-an-hour) to supplement this by oral presentation of the salient points. Hence, there is rarely any reference to the actual authorities during the oral proceedings; the judge goes through the briefs in the seclusion of his room and may be aided in the needful research by a qualified law clerk.[15]

[12] *Supra*, p. 342.

[13] The winner obtains a qualified indemnity in respect of costs—*qualified* because only those costs are recoverable which a court official (in the High Court, a Taxing Master) decides to have been essentially incurred. In practice this means that the winner will have to bear some part of his own costs, *i.e.*, the difference between "party-and-party" costs and "solicitor and own client" costs.

[14] It is our impression that the over-all cost of litigation in the States is no less high than in England, but the two practices referred to in the text spread the burden. In the States the complaint is mainly about the law's delays (which are appalling in some cities); in England there is now no complaint on this score but grave complaints about the expense.

[15] The Law Clerk is an important cog in the American judicial machinery and the post of clerk to a well-known judge is eagerly sought after by the brightest and best law graduates as the ideal opening for one or two years after graduation. But in some states, the state (as opposed to the federal) judiciary have to manage without clerks. There is no equivalent post in England. Our judges have clerks but these are not qualified lawyers except in magistrates' courts where the judges are normally laymen with a solicitor as a clerk to the whole bench.

In England, on the other hand, the argument is always entirely oral and during the course of it counsel will take the judge through the authorities on which he relies, reading out extracts from the judgments ("opinions" in American parlance [16]) while the judge follows from a volume before him. Hence, an English trial involving any point of law necessitates the presence in the court of a sizeable collection of legal literature.

This, indeed, is but one illustration of the greater "orality" of the English trial. The judge is assumed (normally correctly) to be wholly ignorant of the case at its opening in court. Hence, counsel reads out the pleadings, the correspondence and everything else on which he wishes the judge to be informed. To an American it seems that although the English may have largely eradicated the jury they conduct the proceedings in a manner only explicable on the assumption that everything has to be explained to a bunch of laymen. Yet the same applies even to the type of proceedings in which there never was a jury; for example, in Chancery matters where, although the evidence will normally be contained in written affidavits, these will be read by counsel from beginning to end.

This orality extends even to the judge's decision. In England in the trial at first instance the judge will almost invariably give an oral judgment off the cuff. Even in the Court of Appeal this is the usual practice.[17] Only in the rare cases which reach the House of Lords are written decisions normally given after mature consideration. In the States, on the other hand, it is almost invariable practice for the judges, whether at first instance or on appeal, to hand down considered opinions.[18]

Another contrast is in the greater extent to which many American jurisdictions have succeeded in breaking down the veil of secrecy behind which each party is allowed to prepare its case. As a result of pre-trial conferences before the judge,[19] and pre-trial examination of the opponent's witnesses, the element of surprise is eradicated from a civil case to a much greater extent than is necessarily so in England. On the other hand, jurisdictional disputes are far more common. American federalism has led to a most complicated arrangement of federal and State courts operating side by side with complicated rules as to their respective jurisdictions. In certain types of litigation, therefore, time- and money-consuming objections to jurisdiction and venue are recognised tactics. England is, at least, free from this.

[16] The Americans, more logically than the English, draw a distinction between the formal "judgment" in the case and the "opinion" of the judge in which he gives his reasons for the order he makes. In England whatever the judge says at the conclusion of the case is described as his judgment.

[17] See Evershed, *The Court of Appeal in England* (1950), p. 16.

[18] In the preparation of which they are likely to have received considerable assistance from their clerks.

[19] In this and in other ways American judges seem to exert greater pressure on the parties to settle prior to the hearing than is customary in England.

Conclusions

In this paper we have drawn attention only to the contrasting features of our two systems. But it cannot be too strongly stressed that the similarities derived from our common heritage are far more striking than the differences. Both systems are still based on judge-made law [20] rather than upon codes, both draw their judges from the ranks of private practitioners rather than from a separate magisterial profession, both retain essential common-law safeguards of civil liberty such as habeas corpus and cross-examination. And the lawyers of both would recognise the following words as aptly applying to them:

> "From all outward appearances the . . . lawyer is much like everybody else. He is dressed no better than representatives of other occupations of businesses requiring contact with the public . . . Certainly he possesses neither the house nor the car which corresponds to the income which others may think he earns based upon his many years of education and the hours he devotes to his profession." [21]

And, alas, the following also:

> "Yet he is surprisingly unpopular. He has been unhappily described as one who gets two other men to strip for a fight and then takes their clothes." [22]

L. C. B. Gower.*
Leolin Price.†

[20] But the doctrine of *stare decisis* has become far more rigid in England than in the States.
[21] They are, in fact, taken from the opening words of Blaustein and Porter.
[22] *Ibid.*

* Solicitor. Cassel Professor of Commercial Law in the University of London.
† Of the Middle Temple, Barrister-at-Law.

THE INDEPENDENCE OF GHANA

In law, as in politics, the year 1957 will stand out as a landmark in the history of the Commonwealth. The Ghana Independence Act, 1957, has made provision for "the attainment by the Gold Coast of fully responsible status within the British Commonwealth of Nations." A similar Act relating to the Federation of Malaya is likely to be passed in the near future. If parliamentary time is available, legislation will be introduced to give effect to certain agreed changes in the constitutional powers of the State of Singapore and the Federation of Rhodesia and Nyasaland, although these territories will not thereby acquire a status equal to that of Ghana or Malaya.

Independence within the Commonwealth cannot be attained by a dependent territory without legislation by Westminster. Legislation is required to alter the definition of the status of the territory in English law; to empower the local legislature to make laws that are repugnant to Acts of Parliament extending to that territory and to make laws with full extra territorial effect [1]; and to abrogate (or to purport to abrogate) the unfettered power of the United Kingdom Parliament to make laws for the territory concerned without the request or consent of the government or legislature of that territory. For the older Dominions, the necessary legal changes were made by the Statute of Westminster, 1931. For India, Pakistan and Ceylon they were made by the Indian Independence Act, 1947, and the Ceylon Independence Act, 1947.[2] The main provisions of the Ghana Independence Act closely follow those of the Statute of Westminster and the Ceylon Independence Act; the Act is not, therefore, of unusual legal interest. It takes its place as one of the last stages in a course of political and constitutional evolution that is of absorbing interest and of incalculable significance.

From Crown Colony Status to the Threshold of Independence

Only the briefest sketch of the story can be offered here.[3] The first regular European contacts with West Africa were for the

[1] The effect of removing the doctrine of repugnancy and conferring full extra-territorial competence is to empower the legislature of the country concerned to abolish the appeal by special leave from local courts to the Judicial Committee of the Privy Council (*British Coal Corporation* v. *R.* [1935] A.C. 500), unless the legislature is prevented from so doing by an express constitutional limitation.

[2] See generally, Wheare, *The Statute of Westminster and Dominion Status* (5th ed., 1953). For Ceylon, see Jennings, *The Constitution of Ceylon* (3rd ed., 1953); and for India and Pakistan, see Jennings, *Constitutional Problems in Pakistan* (1957).

[3] See Wight, *The Gold Coast Legislative Council* (1947) (especially for the period 1919–1946); Bourret, *The Gold Coast* (2nd ed., 1952); Apter, *The Gold*

purposes of trade, and for long the most sought-after commodity was the African slave. The British gradually ousted their European rivals, and after the abolition of the slave trade in the early nineteenth century political penetration followed to protect commerce. To the Africans the most meaningful political development during these early years was the signature of a treaty known as the Bond between a group of native chiefs and the British Governor in 1844. The immediate importance of the Bond was small; but it came to symbolise the sovereignty once enjoyed by the indigenous authorities, and the Government of the Gold Coast was to choose the 113th anniversary of the signature of the Bond as the day of independence.

In 1850 a distinct government was established for the Gold Coast, which had formerly been annexed to the colony of Sierra Leone. After a period of experiment and indecision, the Gold Coast was finally proclaimed as a separate colony in 1874, with its own Governor, Executive Council and Legislative Council. The first African legislative councillor was appointed in 1888. In 1901 the last of a long series of Ashanti wars ended with the annexation of Ashanti. In the same year a protectorate was established over the Northern Territories. Togoland, which was acquired as a British mandated territory in 1919 and became a trust territory in 1946, was administered as part of the Gold Coast. Hence the Gold Coast was a multiple dependency, comprising the Gold Coast Colony (a settled colony governed under the British Settlements Acts), the colony of Ashanti (a conquered colony governed by virtue of the prerogative), the Northern Territories protectorate and the mandated or trust territory of Togoland (governed under the Foreign Jurisdiction Acts); and until 1950, when the Gold Coast Legislative Council was empowered to legislate for all parts of the Gold Coast, the distribution of legislative authority between the Governor and the Legislative Council was complex.[4]

For two decades the Gold Coast was administered under the Constitution of 1925.[5] The Executive Council consisted entirely of officials until 1942, when two African unofficial members were added. The Legislative Council had an official majority; only nine out of its thirty members were elected Africans, but this proportion

Coast in Transition (1955) (a survey of modern developments in terms of political sociology); Hailey, *Native Administration in the British African Territories* (1951), Pt. III, Chap. 8; Wright, *Black Power* (1956) (a vivid impression of the *mystique* of the Convention People's Party); *Ghana*: the Autobiography of Kwame Nkrumah (1957); Timothy, *Kwame Nkrumah* (1955).

Recent constitutional developments are surveyed by Wiseman, "The Gold Coast: from Executive Council to Responsible Cabinet," 10 Parliamentary Affairs 27, 195; Holland, "Constitutional Experiments in British West Africa" (1957) 2 *Public Law* 42; see also *The Making of Ghana* (H.M.S.O., 1957), and the official reports referred to in subsequent footnotes.

[4] Wight, *British Colonial Constitutions, 1947* (1952), pp. 80–81.

[5] S.R. & O. 1925, p. 1740.

was a high one for British African territories. The hectic pace of subsequent constitutional developments is explained partly by the failure to move forward during this period; but it is right to say that there was little pressure for reform from the African side and that the catalytic effect of the war and its aftermath on African opinion was unforeseeable. In 1946 a new Constitution was introduced [6]; the Legislative Council became a representative legislature with a majority of elected members, but the Executive Council remained responsible to the Governor alone. That the 1946 Constitution was short-lived is not surprising. Experience in North America and the West Indies had shown that a representative legislature was seldom capable of working in harmony with an irremovable executive. But the tensions that developed in the Gold Coast arose without rather than within the legislature. The African legislative councillors were, on the whole, cautious men, attached to traditional institutions; outside, a more radical spirit of nationalism was being fomented by new men to whom the chiefly elements were no less repugnant than the imperial power. In 1948 serious riots occurred. The commission of inquiry that was sent out to inquire into the cause of the disturbances made proposals for further political reforms.[7] The United Kingdom Government decided to set up an all-African Committee on Constitutional Reform under the chairmanship of a distinguished African, Mr. Justice Coussey. The Coussey Committee, in a report which is of the greatest interest, recommended (*inter alia*) that the Executive Council should become collectively responsible to the legislature.[8] Its recommendations were accepted, with certain reservations, by the United Kingdom Government, whose decision was conveyed in a dispatch from the Secretary of State for the Colonies to the Governor of the Gold Coast.[9]

The 1925 Constitution had lingered on for twenty-one years; the 1946 Constitution was dead and buried before five years were out. Its successor, produced by the now philoprogenitive Colonial Office in 1950,[10] pointed the way ahead to independence. It provided for a Legislative Assembly of eighty-four members of whom all but nine were elected. More important, the Executive Council was reconstituted with a majority of representative members chosen by the Governor from the Assembly and approved by the Assembly. At the elections held early in 1951, the Convention People's Party, whose leader, Dr. Kwame Nkrumah, was serving a sentence of imprisonment for sedition, became the largest political group. The Governor, Sir Charles Arden-Clarke, took the courageous step of

[6] S.R. & O. 1946, No. 353.
[7] Colonial No. 231 (1948), para. 122.
[8] Colonial No. 248 (1949), paras. 410, 412. Most of the members of the Coussey Committee have now joined the ranks of the Opposition or retired from public life (Apter, *op. cit.*, p. 173).
[9] Colonial No. 250 (1949).
[10] S.I. 1950, No. 2094.

ordering Dr. Nkrumah's release, and Ministers from the C.P.P. took office. In 1952 the prison graduate [11] was appointed to the newly created office of Prime Minister. The decisive steps towards independence had now been taken. Unless the new government proved to be utterly inept or attempted to subvert the democratic basis of the Constitution, or unless the forces of tribal particularism became stronger than those which bound the peoples of the Gold Coast together, there was now no question of moving backward or even of standing still. The Government of the Gold Coast, conscious of its place in the vanguard of African nationalism, was pressing onward, and its end was freedom.

In 1953 a further set of proposals for constitutional advance initiated by the Gold Coast Government was accepted in principle by the United Kingdom Government, and the Constitution of 1954 [12] was introduced. This provided for a Cabinet, consisting entirely of elected members of the Assembly and presided over by the Prime Minister, and an Assembly consisting entirely of members directly elected by universal suffrage. The Cabinet was the principal instrument of policy, and the Governor was required, in most matters of internal government, to act in accordance with the advice of his Ministers. However, the Governor retained certain personal discretions and extensive emergency powers, and was invested with sole responsibility for defence, the police and some aspects of external affairs. The 1954 Constitution, with minor amendments, was in force up to the date of independence.

The political decisions taken by the United Kingdom Government and its local representative between 1949 and 1952 led inexorably to the goal of independence—as inexorably as the long course of events preceding 1931 had led to the full legislative sovereignty of the older Dominions, as the offer made by the Cripps Mission in 1942 had led to the grant of independence to India five years later, as the experience of co-operation in war had led to the independence of Ceylon in 1948. It is possible to explain the decisions taken in relation to the Gold Coast in terms of expediency alone. That the policy adopted was expedient seems reasonably clear. But this explanation is inadequate to the point of naivety. As Sir Keith Hancock has observed: "In the history of British colonial self-government, the calculation of expediency and the concept of right are interwoven strands of a thread that is continuous for more than three centuries." [13] Those who were responsible for taking the vital policy decisions in relation to the Gold Coast were undoubtedly animated by the conviction that they were doing right and not merely behaving expediently. The

[11] The term is not used in a derogatory sense: C.P.P. members wear the letters PG as a badge of honour, and Dr. Nkrumah's capacity as a prison graduate was doubtless more advantageous to him politically than his capacity as a university graduate.

[12] S.I. 1954, No. 551.

[13] *Colonial Self-Government* (1956), p. 8.

Secretary of State who in 1949 wrote that "H.M. Government are pledged to assist the people of the Gold Coast by all means in their power in their progress towards self-government within the British Commonwealth" [14] was applying in a new context a principle that had been affirmed in general terms by Ministers of an earlier government and has been reiterated by his successors. In some of the territories of the Commonwealth it has been misapplied and power has been handed over, perhaps irretrievably, to minorities; in some territories political evolution has suffered setbacks and the implementation of the principle has been temporarily deferred; occasionally the principle has been lost sight of altogether. There are some territories which are too poor in population and resources ever to attain self-government as independent entities. But the principle, qualified and sometimes obscured, remains. Viewed against this background, the remarkable feature of Gold Coast independence is not that it was achieved but that it was achieved so swiftly.

The Last Steps to Independence

The Convention People's Party was returned to power at the General Election of 1954 with 79 seats out of 104. The government expressed its hope of achieving independence within the lifetime of the new Assembly; it pressed forward with Africanisation of the public service, and began to make preliminary arrangements, in collaboration with the United Kingdom Government, for the establishment of Ministries of Defence and External Affairs after independence. Meanwhile, a strong opposition movement, based on Ashanti and the Northern Territories but also supported by a number of influential chiefs and intellectuals in the Colony, was developing. The Gold Coast had hitherto been governed as a unitary State with special safeguards for the status of Togoland; now demands for federalism, even for partition and secession, were clamant. The United Kingdom Government sent out Sir Frederick Bourne as a constitutional expert to advise on regional devolution. His report, which recommended a substantial measure of devolution within the framework of a unitary State,[15] was broadly accepted by the Gold Coast Government,[16] but the Opposition refused to enter into formal discussions on this basis.

The time had now come for the United Kingdom Government to grasp the nettle. On May 11, 1956, the Secretary of State for the Colonies made a statement of policy in the House of Commons.[17] He reminded the House that the existing Gold Coast Constitution marked the last stage before the assumption by the

[14] Colonial No. 250, para. 21.
[15] The report, issued in December, 1955, is summarised in *Commonwealth Survey*, 1956, p. 22.
[16] See *Commonwealth Survey*, 1956, p. 401.
[17] 552 H.C. Deb. 1557–1558.

Gold Coast of full responsibility for its own affairs. "The grant of such responsibility is a matter for the United Kingdom Government and Parliament and it has always been the wish of Her Majesty's Government that the Gold Coast should achieve its independence within the Commonwealth." But the dispute within the Gold Coast about the form of Constitution after independence was still unresolved, and the proper course was for the peoples of the Gold Coast to have the opportunity of expressing their views at a further General Election. Her Majesty's Government would be ready to accept a motion calling for independence within the Commonwealth passed by a "reasonable majority" in a newly elected legislature and then to declare a firm date for this purpose. "Full membership of the Commonwealth is, of course, a different question and is a matter for consultation between all existing members of the Commonwealth."

* * * * * *

We may pause at this point to consider the distinction drawn between full membership of the Commonwealth and independence (or fully responsible status) within the Commonwealth. The characteristics of full membership of the Commonwealth have never been authoritatively defined, but they may be assumed to comprise the legal attributes of what used to be called Dominion status before that term fell into disfavour,[18] and the right to participate as an equal partner in the machinery of consultation, co-operation and communication within the Commonwealth, including the right to be represented at meetings of Commonwealth Prime Ministers.[19] In 1956 the full members of the Commonwealth were the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon. When Canada, Australia, New Zealand and South Africa were attaining the status of sovereign States, no question had arisen of distinguishing between independence within the Commonwealth and full membership. Dominion status, which meant essentially equality of status with the United Kingdom, was achieved during a gradual process of conventional evolution, culminating in the enactment of the Statute of Westminster; but the substance of sovereignty had been conceded long before 1931. The Dominions had already acquired distinct international personalities and were members of the League of Nations; they were represented in their own right at Imperial Conferences; responsibility for their

[18] On which see de Smith, *The Vocabulary of Commonwealth Relations* (1954), pp. 17–19.

[19] The Prime Minister of the Federation of Rhodesia and Nyasaland is also invited to attend meetings of Commonwealth Prime Ministers (see statement made at the close of the 1956 meeting of Commonwealth Prime Ministers, *Commonwealth Survey*, 1956, p. 531), although the Federation is not a full member of the Commonwealth. The Federation is recognised as occupying a special position for this purpose.

affairs had been removed from the Colonial Office to the Dominions Office in 1925; they were in practice entirely free from any interference with their own affairs. The concept of Dominion status had been recognised at least as early as 1921,[20] although no attempt was made generally to define its incidents until 1926. When the Balfour Report proclaimed the existence of a Commonwealth group of equal partners,[21] the Dominions and the United Kingdom were already founder-members.

The conferment of independence upon India, Pakistan and Ceylon took place abruptly, without a comparable background of pre-existing conventional usage. Acts of the United Kingdom Parliament created three new Dominions with the legal attributes of Dominion status; it was tacitly assumed in the case of India and Pakistan, and explicitly agreed with the United Kingdom in the case of Ceylon,[22] that the relevant constitutional conventions relating to Dominion status would apply forthwith. Soon afterwards the term full membership of the Commonwealth came to supersede Dominion status in the semi-official vocabulary of Commonwealth relations. Dr. Malan, the Prime Minister of the Union of South Africa, viewed with concern the rise of potentially self-governing African States in the British colonial territories, and he questioned the right of the United Kingdom Government to act as the exclusive sponsor of new full members of the Commonwealth club.[23] It was in this context that the United Kingdom Government proceeded to draw a distinction between "the grant of responsible self-government to a colony," which was, in its view, a matter solely for the United Kingdom and the territory concerned, and the admission of a colony to full and independent membership of the Commonwealth, which had to be preceded by consultation with all the existing full members.[24] This proposition left two important questions unanswered. Was the unanimous consent of each of the existing full members requisite? And at what point in the constitutional advance of a dependent territory did consultation become requisite? The first question is still unanswered, for the South African Government did not in fact oppose the accession of Ghana to full membership, and consent was unanimous. The second question, however, has been answered; the United Kingdom Government did not enter into formal consultations with the other full members until after it had introduced the Ghana Independence Bill into the House of Commons,[25] and was clearly

[20] See de Smith, *op. cit.*, p. 8.

[21] Cmd. 2768, p. 14.

[22] External Affairs Agreement between the United Kingdom and Ceylon Governments (Cmd. 7257 (1947)), Appendix II, paras. 1, 2.

[23] See Mansergh, *Documents and Speeches on British Commonwealth Affairs, 1931–1952* (1953), Vol. 2, pp. 1287–1288.

[24] See 488 H.C. Deb. 1207 (June 7, 1951); 502 H.C. Deb. 780 (June 16, 1952); 526 H.C. Deb. 1625 (April 28, 1954).

[25] See 562 H.C. Deb. 239–240 (November 11, 1956).

of the opinion that consultation was not obligatory before the Bill became law. Since it is hardly possible for the concurrence of other full members to be withheld once a dependent territory has been accorded legislative independence, the effective power to determine whether a territory shall be admitted to full membership of the Commonwealth still rests with the United Kingdom. But the foreknowledge that the admission of a new member is likely to be opposed by other full members might conceivably inhibit a United Kingdom Government from pressing the constitutional advancement of a dependent territory to a point of no return.

* * * * * *

At the General Election held in July, 1956, the Government was returned to power with 72 out of 104 seats. It swept the board in the Colony, won a majority in Togoland, and obtained a substantial minority of the seats in Ashanti and the Northern Territories. On August 3 the Legislative Assembly passed a motion calling upon the United Kingdom Government to introduce legislation that year to provide for the independence of the Gold Coast, under the name of Ghana,[26] within the Commonwealth. The Opposition absented itself from the debate on the motion.

The United Kingdom Government took the view that this motion had been passed by a "reasonable" majority, and the Secretary of State accordingly addressed a dispatch[27] to the Governor of the Gold Coast, stating that effect would be given to the desire expressed by the Assembly and that independence would come about on March 6, 1957. In October, 1956, the Gold Coast Government held talks on the future Constitution with the Opposition and the territorial councils, and in November published its Revised Constitutional Proposals for Gold Coast Independence.[28] These proposals were not, however, acceptable to the Opposition. Meanwhile, the Ghana Independence Bill had been introduced. The Bill was warmly welcomed on both sides of the House of Commons, but a number of speakers expressed disquiet at the seriousness of the political situation within the Gold Coast.[29] Late in January, 1957, the Secretary of State, Mr. A. T. Lennox-Boyd, visited the Gold Coast, had talks with representatives of all sections of opinion, and succeeded in securing general agreement on the Constitution to

[26] Ghana was an ancient and powerful African kingdom in the Western Sudan; see Fage, *An Introduction to the History of West Africa* (1955), Chap. 2. African nationalist writers have contrived to discover a link between the peoples of the Gold Coast and the people of ancient Ghana: Apter, *op. cit.*, 22.

[27] Dated September 15, 1956, and published as Appendix I to *The Making of Ghana* (H.M.S.O.).

[28] Published as a Supplement to the *Gold Coast Weekly Review* dated November 14, 1956.

[29] For the House of Commons debates on the Bill, see 562 H.C. Deb. 229–326, 1105–1211.

be brought into operation upon independence. The Ghana Independence Bill received the Royal Assent on February 7, and came into force on March 6. On February 21 the United Kingdom Prime Minister announced that all the Commonwealth Prime Ministers had agreed that Ghana should, as from March 6, be recognised as a Member of the Commonwealth.[30] On the following day an Order in Council embodying the Constitution of Ghana was made,[31] and Letters Patent Constituting the office of Governor-General of Ghana and Royal Instructions to the Governor-General were issued; these instruments also came into force on March 6.[32]

The future status of the trust territory of Togoland had already been determined. At a plebiscite held in May, 1956, under the auspices of the United Nations, a majority of the voters supported a proposal to enter into union with an independent Gold Coast. On December 13 the General Assembly of the United Nations resolved that this proposal be approved and that the trusteeship agreement should on the date of independence cease to be in force, "the objectives of trusteeship having been obtained."

The independence celebrations in Ghana were attended by the Duchess of Kent, representing the Queen, the Vice-President of the United States of America, representatives of other foreign governments, and a large number of Ministers and other political leaders from Commonwealth countries.[33] On May 8 Ghana was admitted to membership of the United Nations by the unanimous vote of the General Assembly.

The Constitutional Instruments

It would have been possible to combine all the new constitutional instruments in a single Act of Parliament. For various reasons this was thought to be undesirable. The constitutional instruments relating to the office of Governor-General have traditionally been issued as separate documents under prerogative powers; they are of no great practical importance,[34] but they form a "dignified"

[30] 564 H.C. Deb. 605.

[31] S.I. 1957, No. 277; it was preceded by an explanatory White Paper (Cmnd. 71 (1957)), entitled "The Proposed Constitution of Ghana."

[32] Apart from certain of the provisions of the Order in Council which took effect from February 23.

[33] For an account of the formal celebrations, see *Commonwealth Survey*, 1957, pp. 242–245.

[34] The instruments for Ghana closely follow the wording of those issued for Ceylon. Clause VIII of the Ghana Letters Patent, however, has a unique provision authorising the appointment of a new Governor-General to hold office while an existing Governor-General is on leave pending retirement; the second appointee is to exercise all the functions conferred by law on the Governor-General. The Governor-General of Ghana, unlike the Governors-General of Canada and South Africa, has not been empowered to exercise all the prerogatives of the Queen; the external prerogatives and the prerogative of granting imperial honours remain vested in the Queen alone, but the Government of Ghana has signified its intention not to request Her Majesty to confer honours on citizens of Ghana.

part of the constitutional framework. At first sight it may appear strange that the substance of the Ghana Constitution should be contained in an Order in Council. Nationalists in Commonwealth countries tend to regard the Order in Council as the legislative symbol of colonialism. Moreover, the Constitutions of the older Dominions were incorporated in Acts of the United Kingdom Parliament. But the Constitution of independent Ceylon was made by Order in Council; and there were excellent reasons why this precedent should be followed for Ghana. An Act of Parliament must go through both Houses; amendments may be moved at the committee and report stages of the Bill; delicately balanced compromises, arrived at after strenuous negotiation, may be upset, and even if the amendments are defeated, the ventilation of every contentious issue may have unfortunate repercussions in the territory concerned. An Order in Council, on the other hand, may come into effect as soon as it is made, and it is not subject to amendment by either House.[35] The advantages of speed and finality[36] were obvious in the situation that had arisen in the Gold Coast.

Some of the necessary legal changes did not relate to matters of internal constitutional structure. They concerned alterations in the status of the Gold Coast and its relationship with the Crown and with the United Kingdom Parliament, and consequential amendments to certain United Kingdom Acts. Most of these provisions could not be made by Order in Council under existing Acts of Parliament, and they were embodied in a separate statute which was appropriately entitled the Ghana Independence Act.

The Independence Act provides that, as from the appointed day,[37] all the territories then comprised within the Gold Coast shall form part of Her Majesty's dominions under the name of Ghana and the United Kingdom Government shall have no responsibility for the government of Ghana or any part thereof. In future United Kingdom Acts the expression "colony" will not include Ghana or any part thereof. Existing laws in the Gold Coast are continued in force, subject to the power of the Parliament of Ghana to amend them. The Act makes a number of amendments to United Kingdom legislation because of the change of status. Of these amendments, three are important. First, section 1 (3) of the British Nationality Act, 1948, is amended to bring Ghana within the scope of the nationality and citizenship scheme introduced by that Act, so that any person who by Ghanaian legislation is designated

[35] The Ghana (Constitution) Order in Council was merely laid before Parliament; it was not made subject to the affirmative or negative resolution procedure.

[36] Section 90 of the Order in Council empowered the Secretary of State to make orders before the appointed day for removing difficulties and giving effect to its purposes. No such order was in fact made.

[37] Section 5 (2) of the Act provided that the appointed day should be March 6, 1957, unless another day was appointed by Order in Council. No other day was in fact appointed.

as a citizen of Ghana will, by virtue of such citizenship, have the status of a British subject. Secondly, the Northern Territories and Togoland are removed from the list of United Kingdom protectorates and trust territories; but it is provided that a person who, immediately before the appointed day, was a British protected person by virtue of his connection with either of these territories shall continue to have that status until he has acquired the status of a citizen of Ghana under Ghanaian law. But for this proviso most of the inhabitants of the two territories would have been deprived of their status as British protected persons without acquiring any new status until Ghana had passed its own citizenship legislation. Now, by virtue of the Ghana Nationality and Citizenship Act, 1957, British protected persons resident in Ghana have become, or may become eligible to be registered as, citizens of Ghana. By section 9 of this Act, citizens of Ghana are designated as Commonwealth citizens.[38] Thirdly, as from the appointed day Ghana ceases to be entitled to the financial benefits of schemes made for colonial territories under the Colonial Development and Welfare Acts and the Overseas Resources Development Acts. This alteration of the law was not an inevitable consequence of Ghana's change of status, and it gave rise to political controversy in the parliamentary debates on the Bill.

The Act also confers what may be called Statute of Westminster powers on the Parliament of Ghana. It ceases to be restricted by the doctrine of repugnancy and the Colonial Laws Validity Act; it is empowered to repeal or amend any United Kingdom legislation forming part of the law of Ghana; it is given full power to legislate with extraterritorial effect; in United Kingdom Acts relative to merchant shipping and colonial courts of admiralty the powers of the Crown in respect of local legislation are removed. It is provided, however, that the powers thus conferred on the Parliament of Ghana do not include power to repeal, amend or modify any of the "constitutional provisions" in force on or after the appointed day otherwise than in such manner as may be specified in those provisions.[39] For this purpose "constitutional provisions" mean constitutional provisions that were already made by Order in Council before the appointed day and are still in force, and any Ghanaian law altering, revoking or re-enacting any such Order in Council or any such Ghanaian law. This means that in the exercise of its powers the Parliament of Ghana is subject to the Constitution and cannot remove the limits upon its sovereignty

[38] In terms of the local laws citizens of Ghana occupy a status similar to that of citizens of Pakistan, who are also designated as Commonwealth citizens but not as British subjects (Pakistan Citizenship Act, 1951, s. 15). In South Africa, India and Ceylon citizens of those countries are not designated by local legislation either as British subjects or as Commonwealth citizens. The status of the citizens of all these countries as British subjects and Commonwealth citizens in English law is provided for by section 1 of the British Nationality Act, 1948.

[39] Sched. I, para. 6.

set by the Constitution except in accordance with the procedure for constitutional amendment there prescribed.

The Act further provides that no Act of the United Kingdom Parliament passed after the appointed day shall extend, or be deemed to extend, to Ghana as part of its law unless it is expressly declared in the Act that the Parliament of Ghana has requested and consented to the enactment thereof. The manner of expressing the necessary request and consent for Ghana is therefore the same as that applicable to New Zealand.[40] It is worth mentioning that immediately before independence the Gold Coast was subject not only to the untrammelled legislative sovereignty of the United Kingdom Parliament but also to the general power of the Crown to make Orders in Council for its peace, order and good government.[41] That the United Kingdom would have legislated for the Gold Coast against the will of its government or legislature at any time after 1954 was improbable; yet, short as was the step from colonial status to independence in terms of the realities of politics, it was as a giant's stride in the formal categories of the law.

To comment fully on the Constitution Order in Council would be impossible in this article. To summarise all of its provisions without an adequate commentary would be tedious. The following points may be singled out as being of special interest.

(1) The executive power is vested in the Queen and may be exercised by her or by the Governor-General as her representative (s. 6). The Governor-General is appointed by the Queen (s. 4 (1)) and his salary is charged on the Consolidated Fund and must not be diminished during his continuance in office (s. 5 (3)). The functions vested in the Queen or the Governor-General shall, in the absence of any provision to the contrary, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar functions in the United Kingdom by Her Majesty, provided that no act or omission by the Queen or the Governor-General shall be called in question on the ground that the relevant conventions have not been complied with (s. 4 (2)). This subsection is reproduced from the Ceylon Constitution.[42] The Governor-General thus becomes a constitutional head of the Executive and ceases to be the representative of the United Kingdom Government; a High Commissioner has been appointed as the United Kingdom representative in Ghana. As in other full members of the Commonwealth, the Governor-General will be appointed and removed on the advice of the government of

[40] Statute of Westminster Adoption Act, 1947 (N.Z.), s. 3 (1). See further, Halsbury's *Laws of England* (3rd ed.), Vol. 5, pp. 451–452, for the corresponding rules relating to other full members.

[41] See the reservation of full powers to Her Majesty in Council by section 73 of the Gold Coast (Constitution) Order in Council, 1954.

[42] *Cf.* Jennings and Tambiah, *The Dominion of Ceylon: the Development of Its Laws and Constitutions* (1952), pp. 68–71; Ceylon Independence Order in Council, 1947, s. 2.

the country concerned, the United Kingdom Government having no *locus standi* in the matter. Sir Charles Arden-Clarke was appointed as the first Governor-General of Ghana. On June 23 it was announced that Her Majesty had approved the appointment of the Earl of Listowel (a former Labour Minister of State for Colonial Affairs) as his successor. The Government of Ghana has not expressed any desire that Ghana should become a republic.

(2) As in Ceylon, constitutional provision is made for a Cabinet charged with the general direction and control of the government and collectively responsible to Parliament.[43] It was natural that an independent Ghana should prefer a system of responsible government, based on the familiar model of the British Constitution, to the American system of presidential government or any other system. But matters that could appropriately be left to regulation by long-established constitutional conventions in the United Kingdom were better stated formally and explicitly in the conditions obtaining in Ghana. The Ghana Constitution, indeed, goes a good deal further than even the Ceylon Constitution in enacting the rules relating to Cabinet government and ministerial responsibility. And the rules adopted differ in some respects from the rules adopted in the United Kingdom. Thus, the minimum size of the Cabinet is fixed at eight members, and the quorum is fixed at four (ss. 7 (1), 13 (2)). If the Assembly expressly passes a motion of no confidence in the Government, the Governor-General must terminate the appointment of the Prime Minister unless within three days the Prime Minister advises him to dissolve the Assembly (s. 7 (4)). Upon the appointment of a new Prime Minister the offices of the other Ministers become vacant (s. 8 (1)); in the United Kingdom a change of Prime Minister does not necessarily involve the vacation of other ministerial offices.[44] A Minister must be a Member of Parliament (s. 7 (1)), and his office becomes vacant if he ceases to be a Member of Parliament (except where Parliament is dissolved) or if he absents himself from Ghana without permission (s. 8 (2)). Provision is also made for the taking of official oaths, precedence of Ministers, summoning of the Cabinet, presiding in the Cabinet, transaction of business and voting in the Cabinet, assignment of responsibilities to Ministers, and the appointment and duties of parliamentary secretaries, permanent secretaries and the Secretary to the Cabinet (ss. 9–17).

[43] Ghana (Constitution) Order in Council, 1957, s. 7 (1). Compare the Ceylon (Constitution) Order in Council, 1946, s. 46 (1); and see the Gold Coast (Constitution) Order in Council, 1954, s. 5. Many of the provisions of the 1957 Constitution relating to the executive branch of the government have been taken over, with appropriate modifications, from the corresponding provisions of the 1954 Constitution.

[44] If, in the United Kingdom, a Prime Minister submits the resignation of the Government, all ministerial offices will be vacated. But if a Prime Minister dies in office, or resigns for reasons personal to himself, the other Ministers do not vacate their offices; nor do they necessarily vacate them upon the appointment of his successor, though they are deemed to have placed their offices at the new Prime Minister's disposal.

(3) The Attorney-General is to continue to be a public officer and is vested with the sole responsibility for criminal prosecutions. A Minister may be given the responsibility for the affairs of the Attorney-General's department, but this arrangement is not to affect the Attorney-General's constitutional responsibilities with respect to prosecutions (s. 14). On this matter the Gold Coast Government made at least a temporary concession, for it had proposed that the Attorney-General should be a Minister. In India and Ceylon the Attorney-General is a public officer.

(4) The Parliament of Ghana is to be a unicameral body, comprising the Queen and the National Assembly. The National Assembly is to consist of a Speaker [45] and not less than 104 or more than 130 members elected by secret ballot on the basis of universal suffrage. Candidates and voters must be citizens of Ghana. Delimitation of constituencies is to be carried out under the supervision of a commission composed of persons not actively engaged in politics. Questions as to the right to membership of Parliament are committed to the Supreme Court (Parts IV and IX).

(5) The maximum duration of an Assembly is five years. Provision is made for annual sessions. Prorogation will not have the effect of killing a Bill. The Governor-General is given a discretionary emergency power to reconvene an Assembly that has been dissolved, and this Assembly may be kept in session until the meeting of the new Assembly (ss. 46, 47).

(6) The former provisions relating to the reservation of Bills and the royal power of disallowance of legislation are not reproduced. Ghana now stands alone among the non-republican members of the Commonwealth in having no constitutional provision whatsoever for reservation or disallowance.[46] The Governor-General is empowered to refuse the Royal Assent to a Bill (s. 42 (2)), but he must exercise this power in accordance with the conventions appertaining to the Royal Assent in the United Kingdom.

(7) The Constitution of Ghana is a unitary, not a federal Constitution. Ghana is divided into five regions, each of which is to have a head elected by the House of Chiefs [47] of the region (except in Ashanti, where the head will be the Asantahene), and a Regional Assembly upon which Parliament is to devolve various

[45] He is to be a person, not being a Minister, parliamentary secretary or public officer, who is elected by members by secret ballot. If he is already a member he must resign his seat.

[46] For the position in respect of the other full members, see Halsbury, *op. cit.*, 449–450.

[47] Houses of Chiefs are to be established by Act of Parliament for each region. They will have advisory and consultative functions in respect of matters referred to them, including questions of customary law (s. 67); they will have certain judicial functions regarding matters of a constitutional nature affecting the office of chief (s. 68); and certain classes of Bills must be referred to them (ss. 32, 35; see *post*). Section 66 provides: "The office of Chief in Ghana, as existing by customary law and usage, is hereby guaranteed."

responsibilities, including powers over the police (ss. 63–64).[48] But the Regional Assemblies are not invested by the Constitution with any sphere of *exclusive* legislative competence.

(8) Although the powers of the Parliament of Ghana are not limited by the provisions for devolution, its power to make laws for the peace, order and good government of Ghana is exercisable subject to the Constitution; and the Constitution imposes restrictions upon its competence which deprive it of the character of a sovereign legislature. In the first place, certain prohibitions and guarantees are written into the Constitution. No law may make persons of any racial community liable to disabilities to which persons of other such communities are not made subject; nor (subject to restrictions that may be imposed for preserving public order, morality or health) may any law deprive any person of his freedom of conscience or the right freely to profess, practise or propagate any religion. Laws for the compulsory acquisition of property must provide for the payment of adequate compensation determinable by the Supreme Court.[49] To the extent that a law contravenes any of these provisions it shall be void and may be so declared by the Supreme Court (ss. 31, 34). Secondly, special procedure involving regional participation as well as parliamentary legislation is prescribed with respect to Bills on a number of matters of constitutional importance. For any alteration of the most vital provisions of the Constitution (enumerated in the Third Schedule), a Bill must (i) be referred after the committee stage to every House of Chiefs and Regional Assembly, (ii) obtain the approval of two-thirds of the Regional Assemblies and (iii) obtain at the third reading in the National Assembly a two-thirds majority of the total number of members of the National Assembly. Bills to abolish, suspend or diminish the powers of any Regional Assembly must follow a similar procedure except for reference to the Houses of Chiefs, and the Regional Assembly immediately concerned must itself pass the Bill (s. 32 (2) (3)).[50] Since one of the five regions is Ashanti, and another consists of the Northern Territories and Northern Togoland, these safeguards appear to be substantial. Bills to amend those parts of the Constitution not specified in the Third Schedule may be passed by a two-thirds majority of the total membership of the National Assembly (s. 32 (1)). A somewhat complicated set of preliminary procedures, involving approval

[48] Provision is made for the setting up of a Regional Constitutional Commission to make recommendations on the composition and powers of Regional Assemblies (s. 87). The Interim Regional Assemblies (s. 85) are empowered to establish Police Relations Committees "with the object of encouraging good relations between the Police Force and the public" (s. 86).

[49] In para. 33 of its Revised Constitutional Proposals for Independence (see note 28, *ante*), the Gold Coast Government expressed its intention of subsequently introducing guarantees of fundamental rights similar to those incorporated in the Indian Constitution.

[50] If the Assembly of a region affected does not approve such a Bill, the Governor-General may order a referendum to be held in that region (s. 32 (3) (*d*)).

by Regional Assemblies and (in some cases) local referenda, is prescribed for Bills to alter regional boundaries and to create new regions (s. 33); a simple majority in the National Assembly then suffices.

A Bill affecting the traditional functions or privileges of a chief must be referred to the House of Chiefs of the Region concerned; the National Assembly may proceed with the Bill after three months' delay (s. 35).

(9) The appointment, promotion, transfer, removal and disciplinary control of public officers (other than permanent secretaries or officers of corresponding or higher posts, and the holders of senior overseas posts) is vested in a Public Service Commission, the members of which are appointed on the advice of the Prime Minister (ss. 49–51). The Prime Minister has signified his intention to consult the Leader of the Opposition before advising on the appointment of members of the Commission.[51] Regulations regarding the Commission will be made on the advice of the Commission itself (s. 52). It is obviously a matter of importance that appointments in the public service should not be made in return for past or future political support.

(10) The Chief Justice of the Supreme Court is to be appointed on the advice of the Prime Minister; Justices of Appeal are to be appointed on the advice of the Prime Minister after consultation with the Chief Justice; puisne judges are to be appointed on the advice of the Judicial Service Commission, which remains constituted as under the 1954 Constitution and is responsible for advising on the appointment, promotion, transfer, removal and disciplinary control of other judicial officers. The provisions for security of tenure of superior judges are continued, and retiring ages are fixed (Part VII). Provision is made for the retirement on pension of existing overseas officers who are superior judges (s. 77 and the Second Schedule).[51a] The jurisdiction of the West African Court of Appeal in Ghana is terminated,[51b] but the Government of Ghana intends to retain the appeal to the Judicial Committee of the Privy Council.[52]

The Constitution also contains provisions relating to parliamentary privileges and procedure, finance, membership of local government councils, and a number of transitional matters.

Conclusion

The birth of Ghana has brought an accession of strength to the Commonwealth and to the United Kingdom in world affairs. The

[51] Cmnd. 71 (1957), para. 11.

[51a] For the future position of certain officers electing to continue in the service of the Government of Ghana, see Public Officers Agreement between the Government of the United Kingdom and the Government of Ghana (Cmnd. 158 (1957)).

[51b] S.I. 1957, No. 279.

[52] See the Government's Revised Constitutional Proposals for Gold Coast Independence (note 28, *ante*), para. 27.

words of Dr. Nkrumah, spoken on the day of independence, may be quoted [53]:

> "We part from the former Imperial Power, Great Britain, with the warmest feelings of friendship and goodwill. This is because successive Governments in the United Kingdom recognised the realities of the situation in the Gold Coast and adopted their policy accordingly. Thus, instead of that feeling of bitterness which is often born of a colonial struggle, we enter on our independence in association with Great Britain and with good relations unimpaired. We are proud that we are the first British colonial territory in Africa to gain its freedom and to enter into the Commonwealth. We value the Commonwealth link because it brings us closer to other members who practise the same type of democracy and have the same system of laws which we have established here. Particularly we value it because it brings us into association with the newer Commonwealth countries of Asia whose problems are so akin to our own."

And inevitably the birth of Ghana has given a new impetus to nationalist sentiment, not only in British African dependencies but also in African territories controlled by other European Powers.

To attempt to forecast the future course of constitutional development in Ghana would be foolhardy. The institution of Parliament is deeply respected, but the successful working of parliamentary government in Britain has been founded on traditions and assumptions that are largely absent in Ghana. The characteristics of the party in power and its attitude towards its leader, the lack of any potential alternative government, and the fact that the parliamentary opposition comprises elements for whom the focal point of loyalty is the tribe rather than the nation, may impose stresses on the working of the Constitution. And in the principal language of Ghana the word for federalism means "separation," whilst in several other local languages "the Opposition" can only be translated by "enemies." [54] It is impossible to foretell how far the provisions for regionalism and the status of chiefs will effectively satisfy the demands of those who stand firmly by tribal traditions, how far the many serious problems of public administration will be solved, or how far these matters will give rise to political and constitutional conflict. The Constitution of Ghana is unlikely to remain for long set in the mould hastily cast for it in 1957. The present government has the two-thirds majority required to change a number of its provisions, and that majority will doubtless be employed. From the manner in which it is employed, a pointer may be given to the future of parliamentary democracy in Africa.

S. A. DE SMITH.*

[53] Address in Reply to the Queen's Speech in the National Assembly, March 6, 1957 (reported in (1957) 38 Jl. of the Parls. of the Cw. 282–283).

[54] See (1957) 13 *The World Today* 61.

* Reader in Public Law in the University of London.

INDIVIDUAL RIGHTS AND NATIONAL SECURITY

A Comparative Study

The purpose of this article is to consider the system which the United Kingdom has evolved to protect itself against internal threats aimed at the very nature of its Government. It is proposed to evaluate the operation of the system and its principles by comparison with similar programmes of other common law nations. In this manner it is hoped to emphasise the inconsistency of the view that such procedure should not be statutory; and further and more important, to support the proposition that a charged person should be entitled to representation before the tribunal created to advise the responsible Minister on individual cases.

John Lord O'Brian, a well-known American constitutional lawyer, has said " the all-important fact is that all of these security programmes embody a consistent trend in governmental policy which is in conflict with our traditional standards of justice and also with the fundamental principles of American fair play." [1] We have been very proud of our British instinct for fair play, but there is a very real danger in so relying on this instinct as being present in one body asked to fulfil inconsistent functions, that the methods of the separation of functions on which this tradition was built are forgotten. The Government has consistently maintained that the security programme is an entirely administrative process, in which the law *per se* has no part; and that the hearing process can and should be carried out by a tribunal acting as prosecutor, defence counsel, and judge.

In England the parliamentary system of government necessitates a greater atmosphere of trust in public officials than in the United States. The conviction in that country of the need for continuous check and counter-check is today accentuated by the cold war of dogma. It is not something to which we aspire in England. In the United Kingdom the discretion of the public servant is not something which can or ought to be deprecated. What should be deprecated is imposing on that discretion something which it is impossible for one body adequately to determine. The very creation of a tribunal is an admission that within its conferred jurisdiction pure ministerial discretion cannot suffice in accordance with fundamental principles of justice and individual rights. It necessarily follows that responsibility for the decision only should rest on the tribunal. Further, the duty and responsibility for

[1] *National Security and Individual Freedom*, 1955, front cover.

presenting the case to be decided should rest on representatives of the parties, independent of the board and of each other.

PROCEDURE IN GREAT BRITAIN

The British system was essentially outlined in a Treasury Memorandum of May 5, 1948, now superseded by a Memorandum of March 1, 1957. The scope of the programme extends only to those who are or who are to be engaged in work "vital to the security of the State."[2] Each Minister is responsible for designating which posts in his department are within this category.

Any servant who is employed or intended to be employed in connection with such work and whom the Minister finds prima facie either to be a member of the Communist Party or to have recently been such, or who "in such a way as to raise reasonable doubts about his reliability is, or has recently been sympathetic to Communism, associated with Communist sympathisers, or is susceptible to Communist pressure"[3] will normally be sent on special leave with pay.[4] He must be told under which head of the criteria he is thought to come, and given any particulars "such as the date of his alleged associations" that might enable him to clear himself. It is recognised, however, that there must be limits on the information given "for he cannot be given such particulars as might involve the disclosure of the sources of the evidence."

A period of fourteen days is allowed for reply[4] and if the Minister does not vary his ruling in the light of this reply a further seven days for the communication of a decision whether or not to appear before the Advisory Body. This tribunal is composed of three retired civil servants[5] who are to recommend to the Minister whether in their opinion the charged person is or has recently been a member of the Communist Party or had Communist sympathies or associations of the types described above. The 1957 Memorandum amended the terms of reference of the Advisers to

[2] *Cf.* the United States definition of "sensitive positions," *i.e.*, where "the occupant . . . could bring about by virtue of the nature of his position material adverse effect on the national security." Read literally even this is wider than the scope of the whole British Security Programme. The division sensitive–non-sensitive is used chiefly to determine the extent of initial investigation of an appointee. Also for the former, investigation is carried out prior to commencement of duties; for the latter, generally after.

[3] *Cf.* the 1948 Memo ". . . associated with the Communist Party . . . in such a way as to cause legitimate doubts as to his reliability." The new phraseology would seem so wide as to lack any real meaning as a definition, and so, it is submitted, loses most of its purpose.

[4] Under the U.S. procedure there is suspension without pay, which has aroused much controversy. This provision takes on added hardship when faulty screening results in a majority of those charged being cleared.

[5] *Cf.* United States. In that system the boards are made up of *practising* civil servants of agencies other than that from which the charged employee comes. It seems far preferable, as is done in the United Kingdom, to combine the experience of trained administrators with the consistency of having one board, inevitably leading to some uniformity in decisions—a desired goal.

allow an answer which was neither a definite "yes" nor a "no." If they are in doubt they are simply to assess the evidence presented before them for the Minister.

If the Minister decides to uphold this recommendation he will give the civil servant an opportunity to make a representation to himself or his representative before action is finally taken. Similar opportunity will be given when the civil servant does not wish his case to go to the Advisers.

If the Minister finally decides that the charged employee is a security risk within the 1948 Memorandum, the civil servant will either be transferred to a non-secret post or, if this is not possible, dismissed. He may, however, accept the option of resigning.

As a last resort prior to the decision to repost or dismiss, the employee's staff association will be afforded an opportunity of suggesting any alternative to reposting that it may think suitable, or suggesting a possible reposting as an alternative to dismissal or resignation.[6]

Statutory Rights

A civil servant is employed at the pleasure of the Crown. Therefore the security process is entirely administrative, ruled by regulations and departmental memoranda.[7] The establishment of the tribunal in England represents a concession, but at the same time remains a privilege which may be revoked merely by administrative order.

The Government has refused to create a statutory procedure for security risk cases. It has conceded that the purge procedure is "the most inquisitive form of investigation in existence today," but at the same time specifically refused to write it into any statute. The reasons given are that it would not be in the best interests of the employees to make the procedure inflexible in this way; for new legislation would then be mandatory for the relaxation of present conditions. In effect, the Government is unwilling to create a legal right, but clings to administrative discretion based on an outdated legal theory of civil service employment.

Courts have vacillated in their attitude to contracts and statutes which on their face limit the power of the Crown to dismiss at pleasure. The majority of recent decisions are in favour of

[6] The right of a charged person to a hearing before the Advisory Body has now been extended to employees of government contractors upon recommendation of the Privy Councillors (see Hansard H.L., Vol. 197, col. 1263). Formerly, the industrial employee had no right of appeal when dismissed following a Ministerial directive, which his firm would be bound to accept under its contract with the government. For full discussion of this problem and in particular the dismissal of Mr. Lang by I.C.I., see Hansard H.L., Vol. 197, cols. 1224–1278.

[7] The only mention of security procedure in a statute is in the Atomic Energy Authority Act, 1954, First Schedule, para. 5 (4). The procedure applicable to the Authority is there made dependent upon that operative with respect to the Civil Service.

recognising a surrender of this power,[8] where there is an express declaration to that effect by the Crown. Professor Street says of the Civil Service[9]: "It is generally agreed that bureaucracy must be professional, based on a career service system. . . . It is thought that the civil servant must be secure against removal or discrimination for arbitrary reasons. Here the law must play its part, for it can give him this security either by upholding contracts which make him dismissible only for cause, or by setting up under statute a system of administrative bodies to enforce with due procedural safeguards administrative responsibility. If the law does neither it is not making its contribution to the creation of an efficient bureaucracy." He points out that in England the Crown practice of relying on the privilege theory is contrary to public policy, gives civil servants no legal protection in case of dismissal, and deprives them "of that sense of security essential for the best performance of their duties."

The danger of leaving the Crown-employee relationship to contract is that it is the doorway to the standard form contract.[10] The duty of a government in this kind of matter is on a much higher plane than that of a private individual. It is clearly not consonant with its purpose that it should be able to limit its liability to the detriment of an individual who has a contract with it. The safest method of assuring these rights would be to fill the present legal lacuna by statute, so that the Crown surrenders its power both to dismiss at pleasure and to contract to dismiss at pleasure.

The peculiar issue facing "The Three Wise Men" forming the Advisory Body, calls undoubtedly for somewhat narrower rights on the part of the servant than on issues where national security is not involved. Conversely, however, it necessitates established legal rights.

The objections of the Government and others to inserting in the Atomic Energy Bill a procedure which would govern the rights of persons employed by the Atomic Energy Authority, seem to be completely misconceived. The chief objection was that it would freeze the procedure to put it in the Bill. The Government, however, would be at liberty to grant more privileges than the statutory rights created; and the only result would be to freeze the power of the Government to revoke the procedure without new legislation. Other objections advanced by Members of Parliament

[8] See *Reilly* v. *R.* [1934] A.C. 176, at p. 179, *per* Lord Atkin; *McLean* v. *Vancouver Comms.* [1936] W.W.R. 651; *Genois* v. *R.* [1937] Ex.Ct.R. 176 (Can.); *Deynzer* v. *Campbell* [1950] N.Z.L.R. 790. Compare *Rodwell* v. *Thomas* [1944] K.B. 596.

[9] *Governmental Liability.* A Comparative Study (1953), p. 111.

[10] The only method to control the abuse of freedom of contract by the widespread use of this type of agreement seems to be to treat them as one would by-laws, and allow the courts to pronounce their terms reasonable or unreasonable. See *Parker* v. *S.E. Ry.*, 2 C.P.D. 416, at p. 428, *per* Bramwell L.J.; *Thompson* v. *L.M.S. Ry.* [1930] 1 K.B. 51, at p. 53, *per* Lawrence L.J.; and Sir Alfred Denning, *Road to Justice*, p. 91.

included the difficulty of who would decide on the information to be given the charged employee or whether a given case was a security case. The same discretion now operative could very well decide these very points. It is simply a specification of minimum procedure that is called for.

Procedure in the United States

To demonstrate the invalidity of these objections one has only to consider the basis of the comparable system of the United States. Public Law 733 (1950) lays down minimal procedure for the Federal Government employee [11] loyalty-security programme.[12] This statute permits the heads of certain designated agencies to suspend summarily and dismiss employees if national security warrants the action.[13] Minimal procedure is prescribed so that the head of the agency " in his absolute discretion and when deemed necessary in the interests of national security " may suspend without pay any employee. The employee must then be notified of the reasons for his suspension with whatever degree of specificity that security, in the opinion of the agency head, permits. He may then show cause why he should not be removed from his position by written statements and affidavits. Employees who are citizens with permanent or indefinite appointment [14] are given, within thirty days, a statement with charges. They have a right to answer these charges in writing and to request a hearing [15] by the agency.

Each agency adopts its own procedure subject to the minimum standards prescribed by the statute. The Department of Justice issued Sample Regulations which have also become a minimum standard. It is in these regulations that the procedure before the hearing boards and the institution of those boards is found. The criteria to be followed in deciding whether a security risk

[11] Security programmes covering the armed forces and defence contractors derive their authority from the power of the military to discipline itself, and the National Security Act of 1947. Also they are imposed as contractual conditions.

[12] The programme in operation at present represents a junction of loyalty and security programmes. The Loyalty Programme was established by Pres.Exec. Order 9835 of 1947 (based on powers exercised under Civil Service Act and Hatch Act, and was abolished in 1953 by Executive Order 10450).

[13] Executive Order 10450 (1953) extended Public Law 733 to all executive agencies and departments. However, the Supreme Court in *Cole* v. *Young* (June 11, 1956) held that in so doing the President had exceeded the statutory delegation permitted by Public Law 733, in extending loyalty-security programme to non-sensitive agencies. The Attorney-General and the Chairman of the U.S. Civil Service Commission in July, 1956, both recommended that Congress pass a Bill to render the former all-pervasive system legally valid.

[14] The probational employee, alien, and employee hired for a limited period are not entitled to an agency hearing.

[15] At the hearing and prior to the hearing the security officer of the agency usually prepares the case against the employee. There has been some criticism over the professional security officer, both as to quality and the practice of regarding such a post as equivalent to a prosecutor. In the United Kingdom such men are " amateurs in the sense that they (do) not spend their whole careers on the job."

exists are laid down by the President's Executive Order 10450 of 1953,[16] the authority for which is the Civil Service Act and Hatch Act of 1939. The hearing boards of the agencies are composed of government employees picked from a panel [17] to hear a particular case. Before or after the charges are read at the hearing the board informs the employee of his right to participate in the hearing, to have counsel, to offer witnesses or other evidence, and to cross-examine any adversary witnesses who may appear at the hearing.

In practice the agency rarely presents a case, for the hearing board has access to the case file and must consider it in reaching its decision. The board is responsible for seeing that the hearing is conducted so that no confidential information is disclosed to unauthorised persons. The entire file, including the hearing record and the opinion of the board, is forwarded to the head of the agency, who is supposed to review the entire case. There is no provision for appeal by the employee or for further investigation at this stage.[18] A written decision is then made to reinstate, transfer, or to remove, and the employee [19] is notified of this decision.

As in the United Kingdom, therefore, the ultimate decision is administrative and requirements of national security override the right of a suspected person to require strict proof of charges.

There are many points in the programme deserving of criticism, notably, (a) the extent of the system [20] and nature of the criteria upon which the boards must base their decision,[21] (b) the personnel of the board, (c) the mingling of the varying duties of decision and prosecution within the agency itself, (d) the tendency to dismiss rather than to transfer. Despite these faults and the necessary element of administrative discretion, the procedure not only recognises the presence of issues best disposed of by a legal method, as in the United Kingdom, but comprises a legal means of disposal not present in the United Kingdom.

Procedure in Commonwealth Countries

In Commonwealth countries the power of the Crown to introduce a security system without legislation depends on the interpretation of the various civil service statutes.

16 For text see Appendix.
17 The agencies nominate their own employees to a roster compiled by the Civil Service Commission.
18 It must be emphasised that this is merely a minimum. Some agencies provide machinery for appeals.
19 In contrast to the United Kingdom by far the great majority of those declared to be security risks are dismissed.
20 However, *Cole* v. *Young* (note 13) confined the security programme to sensitive agencies, thus bringing it in line with the U.K. The programme previously covered all government employees, a needless affront to common sense and individual rights.
21 See Appendix.

In New Zealand it was held in *Deynzer* v. *Campbell* [22] that the Crown was entitled to transfer a civil servant arbitrarily. Two of the learned judges held further that the Crown only had a right to dismiss for the causes stated in the Public Service Act, 1912. O'Leary C.J. and Finlay J. were more cautious in their holding, merely stating that the Crown could dismiss at will if there were no statutory provisions affecting the servant. They did not decide whether there was any residuum of power left in the Crown after the enactment of the 1912 statute.

The Public Service Amendment Act, 1951, s. 7, established a security procedure, specifically providing that it be in addition to the powers granted to the Civil Service Commission to deal with civil servants under the 1912 Act. The later Act provides only for transfer for reasons of national security, and nowhere is there given power to dismiss. The prima facie decision to transfer is made by the Civil Service Commission, and the employee must then be informed by a statement in writing setting forth the reasons for the transfer as fully as they may be disclosed in the opinion of the Commission, having regard to national security. He may then apply for review within twenty-one days. The application is referred to a review authority consisting of three persons appointed by the Governor-General on the recommendation of the Prime Minister. The authority is instructed to make full inquiry and report to the Commission whether in its opinion the termination should be confirmed, modified, or revoked, and "the Commission shall be guided accordingly." [23] Before the authority, the charged employee is entitled to be represented by a legal representative or by another person, but if in the opinion of the authority it is contrary to the interests of national security he himself will not be allowed to be present at the proceedings or to be appraised of the reasons of the decision.[24]

Australia has no security system as such. Powers now possessed by the Public Service Board,[25] to dismiss or transfer an officer if it should find him not necessary for the efficient working of a department or inefficient, are employed to take care of security cases. There has been some agitation that there should be specific security provisions inserted to give the Public Service Board power to hire, fire, transfer, etc., on this ground alone.

The Civil Service Act of Canada contains no provisions which the court might interpret as a surrender of the Crown's power in this regard. This permits a system wholly derived from and

[22] [1950] N.Z.L.R. 790.

[23] *Cf.* United Kingdom, where the tribunal recommends to the Minister with whom the final decisions rests.

[24] Since 1951 there have been no transfers formally attributed to security grounds. The legislation has not been applied. The Public Service Association is pressing for its repeal "on the grounds that it is superfluous and its existence is an insult to public servants."

[25] Public Service Act, 1922–1950.

dependent on executive discretion. The system adopted is entirely arbitrary in the sense that there is no responsibility to Parliament or to the public as to the manner in which it is carried out. Whatever publication of its operations occurs is due to the initiative of the charged employee.

There is no panel, as in the United States, New Zealand and the United Kingdom, by which individual cases are considered.[26] The Government refused to establish rigid criteria for testing loyalty as being an aspect of security, on the theory that the standard by which loyalty is judged depends to an important measure on the degree of trustworthiness which is required in the work which the particular civil servant is doing. Where an individual is suspected of being a security risk, he has not usually the opportunity of learning the nature of the allegations against him, but "where a useful purpose could be served *and* where security regulations would permit it is done and an exception is made to normal practice."

Effect of "Security Risk" Label

Much of the effect of a security programme on individuals is derived directly from the point of view taken by the public in general of the dismissal of a person as a security risk. If such a dismissal is equated with conviction of a "crime" of some kind, involving some tinge of guilt, a procedure akin to that of a court of law is a necessity. Public opinion in the United States today seems generally to make such an evaluation,[27] due to a confusion between the concept of "loyalty" and that of "security." A change in personnel standards was made from "loyalty" under Executive Order 9835 (1947), to "national security" under Executive Order 10450 (1953). This had the effect of broadening the area of disqualification under the programme, but not the desired correlative effect of causing a comparable change in public opinion. To the public it still remains a question of loyalty in large measure.[28] And a disloyal person in any national system is thought a criminal.

[26] Mr. St. Laurent said, in turning down the suggestion that there should be a board or panel to consider these cases, that the assessment of the reliability of a person did not necessarily "or even usually" involve anything that could be termed as charges. These decisions are taken every day in public services and in business.

[27] Mr. Lloyd K. Garrison, who was Dr. Oppenheimer's lawyer before the Security Board to the Atomic Energy Commission, is of the opinion that "the charge of disloyalty, *or even of being a security risk* has become in the setting of today so serious that it is almost like a charge of crime," 43 *Univ. of Chicago Law Review* 1, at p. 2 (1955–1956).

[28] It is essential that the two concepts of "loyalty" and "security" be differentiated. Both supporters and opponents of the procedure tend to identify them. The former Prime Minister of Canada said of the issue of security that "it is distorted and seen in a false light, if it is confused with loyalty. . . ." This point is emphasised by the recommendation of the Conference of Privy Councillors that association with a Communist sympathiser (*e.g.*, wife or husband) may lead to being declared a *security* risk.

On the other hand, the former Minister of Defence Production of Canada, Mr. C. D. Howe, went to the other extreme, equally as harmful, in describing the principles of the security programme: "The concept of guilt or innocence has no place in this process. The Government as an employer is not a tribunal nor does it dictate to individuals what they must or must not think, or with whom they may or may not associate; but, like any other employer, the Government makes every effort to insure that its employees are properly qualified for the work they have to do—and such qualifications must in some cases included a high standard of reliability." [29]

Does this not beg the question? Guilt or innocence has no place simply because there is no decision that a charged employee *is* guilty of some specific act dangerous to State security. The declaration is that potentially he could be guilty in the future—a "decision" based on his record in the past. The stage of "guilt" is never reached and never required to be reached. This is all the more reason for providing as many safeguards as in criminal procedure where a decision of guilt or innocence is rendered upon a specific charge.

Further, it is impossible to agree with the implication in Mr. Howe's remarks that a person dismissed by the government for security reasons is regarded on the same level as one dismissed by a private employer for any reason at all. The reliability required for government employment concerns not only the interest of any employer in an employee, but also the national interest of every citizen. The employee of a private firm and his employer are in a position to separate these two interests, for the national interest has strictly no bearing on the possibility of private employment.

However, one suspects that even this distinction does not hold up in practice. An employer's national interest as a citizen of the State, or his pure patriotism, may not permit him to hire a security risk, who, as declared by the government, will (possibly) not consider paramount the national interest the employer holds sacred. This reluctance to employ could be equated with the case of considering a convicted thief as a prospective employee. But any disinclination to hire in that situation would be within the sphere of the normal interest of an employer, whereas the security risk offends his separate national interest.

To declare that less safeguards are required in a security charge than a criminal charge is to ignore this probable ostracism and interference with such fundamental rights as the right to work and the right to a good name, which will follow from a declaration that a person is a security risk. That there can be no specific charge and that the "verdict" is necessarily based on an individual's future conduct are added reasons that all care should be

[29] Canada House of Commons Debates, 1953–1954, p. 2745.

taken before such a label is hung around the neck of any person. A proper balance between national security and individual rights is essential, and the fact that in these situations the national security must be emphasised more than in others does not mean that it must ride roughshod, so that in its face no rights at all are recognised. "The civil servant is not only a servant of the Crown but a citizen with human rights. . . . It must be remembered that the basis of action is that the civil servant has been adjudged to be of doubtful loyalty and reliability, a slur and a stigma which is going to stick to the obvious prejudice of the individual's future career." [30]

However, the former Prime Minister of Canada, Mr. St. Laurent, was of the opinion that "in dealing with reliability in defence production we are not in a realm of what has come to be called 'human rights and fundamental freedoms'; there is no human right or fundamental freedom involved. No person has a right of access to secret defence items, and no man's freedom is infringed when he is denied such access." [31] But the direct effect of preventing a person from engaging in the employment of his choice has the ultimate result of denying the full exercise of the right to work.[32] Indirectly, the branding of a person as a security risk endangers his future employment generally.

Why should such a system in particular and the Civil Service in general be a question of privilege in the United Kingdom but of law in the United States? We know the historical reasons for the distinction. It is submitted that the theory of privilege is outdated, and illustrates an unwelcome hesitancy on the part of government to accept its responsibilities.

It was generally recognised in the United States that the security programme as it stood prior to *Cole* v. *Young* [33] was too broad. Further criticism is continually voiced at the number of persons in that country who go through the unpleasant experience of facing a security risk charge. 50 to 80 per cent. of these succeed in clearing themselves, illustrating a certain carelessness at the stage when charges are filed.

The system in the United Kingdom covers comparatively few persons [34] and statistics show that an infinitesimal percentage of

[30] E. C. Redhead, M.P., *Bulletin of National Council for Civil Liberties*, Jan., 1949, p. 4.

[31] Canada House of Commons Debates, 2nd Session, 1951, p. 1505.

[32] "Almost as important as the right to personal freedom is the right to earn one's livelihood unimpeded by the exercise of arbitrary power; or, at the very least, without deprivation except in accordance with fairness and natural justice." *Rule of Law*, A Study by The Inns of Court Conservative and Unionist Society, 1955.

[33] *Supra*, note 13.

[34] Chief Justice Warren estimated (prior to *Cole* v. *Young*) that over 8,000,000 Americans were subject to security procedures. This figure was made up of 3,000,000 members of the armed forces, 2,400,000 civilian employees of the U.S. Government and 3,000,000 employees of defence contractors.

these go through the procedure provided.[35] But this comparison is no answer to any criticism when individual rights are at stake. It is little comfort to one who suffers to know that he is one of a few.

The Advisory Body

A stage of the procedure which warrants our special attention under the British system is that of proceedings before the Advisory Body. This tribunal consists of three retired civil servants, a scheme which probably could not be bettered. All suspected security risks are brought before it, a practice which appears to contrast favourably with the United States where each agency has its own board and there is no central hearing body.

Terms of Reference

It must be emphasised that the tribunal itself is presented with an extremely limited issue although the issue within itself is extremely vague. It is not concerned with whether the civil servant is employed or is intended to be employed in connection with work the nature of which is vital to the security of the State.[36] The advisers are asked to report solely "whether or not in their opinion the civil servant is believed to be (1) a member of the Communist Party, or (2) has recently been, or is, sympathetic to Communism, associated with Communists or Communist sympathisers or is susceptible to Communist pressure so as to raise reasonable doubts about his reliability."

The first point about this limited jurisdiction is that it excluded cases of character defects, which may have led to security risks. It appears that in 1948 it was not thought that this type of case represented a sufficient or necessary "security" risk but rather was a question of ordinary employee reliability. Even as recently as 1954, in the debate on the Atomic Energy Authority Control Bill, the then Minister of Works, Sir David Eccles, disapproved of the definition "on the grounds of national security" as a proposed boundary of security risk cases because he thought it would bring in a number of cases that were outside those which the Advisory Body dealt with in the Civil Service system.

[35] The procedure is not available to all those who obviously must submit to security checks. The Conference of Privy Councillors recommended it be extended to cover such employees of defence contractors. At the moment it covers positions "vital to the security of the state" in the Civil Service (including Foreign Service), and the Atomic Energy Authority—positions all subjects to such checks. Some statistics were given by Sir Hartley Shawcross in New York in January, 1954; up to that time sixty-nine persons had been transferred, twenty-three had been dismissed, nineteen had resigned, twenty-eight had been reinstated and nine were on special leave pending decision. It is understood that the complete figures at the beginning of 1957 were as follows: eighty-one transferred, twenty-four dismissed, twenty-three resigned and thirty reinstated; one person was then on special leave pending decision.

[36] A decision for the Minister. Compare the United States, where this question is before the hearing boards as well as whether it is to be judged a risk under various criteria. See Appendix for these criteria.

Although the *Burgess and MacLean* case is probably not such an instance but rather an example of direct Communist influence, it served to focus public attention on the importance of considering persons with character defects as potential security risks. The Conference of Privy Councillors, appointed as a direct result of that case, recognised these factors as tending to make a man unreliable, or to expose him to blackmail or influence by foreign agents. It explicitly recognised, however, that there were such instances which would raise normal reliability questions apart from security.

Mr. St. Laurent of Canada in refusing to release security statistics contended that it was impossible to decide which cases represented security problems as such, and which were questions of ordinary employee reliability.[37] The present terms of reference of the United Kingdom tribunal do not solve this dilemma. They ignore it.

But the Privy Councillors have admitted that many security risks involve character defects.[38] *Ex hypothesi*, therefore, this type of case should go to the tribunal. The Government could and should lay down basic policy lines,[39] for example, that a homosexual or a person with relatives behind the Iron Curtain is a security risk. The Minister as now would have the sole right to determine whether a particular post involved a security risk. The question of whether a person was within a category ought then to go to the tribunal. This is the function for which it was created.[40] At the present time, the Advisory Body does not have the jurisdiction unless the potential risk has become a reality by association with the Communist Party.

Secondly, the board's terms of reference are sufficiently limited so that no administrative discretion is involved. The tribunal is faced with the problem of deciding whether a person is a member of the Communist Party or of Communist association or sympathy.

The Conference recognised that, distasteful as the principle

[37] *Cf.* United States, where this difficulty has led to the political "numbers game." An administration may use figures of security dismissals to discredit previous administrations for faulty measures, and as reflecting credit on itself for rooting out these "risks." It has been alleged that the majority of the cases cited as "security dismissals" involved ordinary suitability procedure. The Civil Service Commission has included in "removals as result of security determination" all persons removed whose files contain material falling under criteria of Exec. Order 10450, no matter whether they were dismissed under Civil Service Procedure *or* under the Executive Order. Thus, for 1953–1955, 3,586 were listed as such; *of these*, 3,241 were terminated under ordinary Civil Service procedure; only 342 under Executive Order 10450 proceedings. Three are apparently unaccounted for.

[38] See Cmd. 9715, Statement on Findings of Conference of Privy Councillors on Security, paragraph 11.

[39] *Cf.* E. O. 10450 of the United States (Appendix).

[40] The Conference of Privy Councillors recommended that "the terms of reference of the Three Advisers should be widened so as to enable them to present a fuller report to the responsible Minister." While from its context the purport of this is not clear, it implies a welcome recognition of a wider definition of "security risks" than heretofore employed.

of risk by association may be, it must be applied as part of the policy of resolving any doubt in favour of the State against the individual. This may well be conceded. Possibly a kind of precedent has been evolved for such cases defining "association." But the danger of losing all boundaries is exemplified by the 1957 Treasury Memorandum which is phrased in terms of "*sympathies*" as well as "*associations.*" The policy of giving the benefit of any doubt to the State as against the individual must be carefully limited. It is submitted that the 1957 amendment has in this respect only succeeded in destroying any semblance of definition. Perhaps the effect will be confined to the phraseology, if the tribunal adheres to any precedents hitherto evolved. It is hoped this will be so.

The United States has a somewhat more subtle definition of what is there termed (surely wrongly) "guilt by association." This seems to be due first to the fact that the security programme covers all government employees,[41] and therefore there is a need for more sharply defined and narrower grounds for dismissal; secondly, to the persistent confusion of loyalty and security. Thus it has been advocated that the reason for a person's joining an organisation should often be the cardinal factor in the security decision. This is in large measure due to the confused character of groups suspected of being Communist fronts. The distinction, while essential in loyalty tests,[42] appears of somewhat less value in security cases.

The Privy Councillors also specified that family relationship would create a sufficient risk. Difficulties encountered in the United States both in this sphere and in that of pressure risks[43] are seemingly due to the same causes as the above. Also the problems are so much more acute in a heterogeneous community such as exists there, compared to the largely homogeneous society of the United Kingdom.

Representation Before the Advisory Body

The cardinal fault of the United Kingdom procedure lies in lack of representation before the tribunal. This has been consistently

[41] But see footnotes 12 and 19.

[42] The Smith Act, 18 U.S.C. 2385, makes it a crime to advocate knowingly or wilfully, etc., the desirability, etc., of overthrowing or destroying the United States Government by force or violence. The Supreme Court held this in *Dennis* v. *U.S.*, 341 U.S. 494 (1951) to require when membership in an organisation is concerned (a) membership in an organisation (b) advocacy by the organisation of the overthrow of the Government by force, (c) knowledge by the members of the organisation's purposes, (d) intent to overthrow the Government by force and violence. (See also the important new decision of the Supreme Court on the interpretation of the Smith Act, handed down on June 17, 1957.) The last element was spelt out although not specifically provided for in the statute, and illustrates the safeguards certainly necessary in cases of loyalty where a criminal offence is the charge. A person must have personal and specific interest. Surely identical criteria do not apply to security cases.

[43] *e.g.*, persons with relatives behind the Iron Curtain.

denied in the face of strong opposition from civil service trade associations and from the Civil Liberties Union. One reason for denial is the view that this is an administrative decision in an administrative process, and representation, whether by trade union official, friend, or legal representative, has no place whatsoever.

A legal representative does not turn the tribunal into a court of law by his mere appearance. He is, however, trained to present an issue with clarity and forcefulness, and there is no more logic in preventing his appearance here than before any other administrative tribunal. Although much of the procedure necessarily conflicts with established traditions of the common law, there is no cause to deny all the usual accepted rights. The present procedure is not unlike that adopted in wartime with regard to persons the Home Secretary was considering detaining under Regulation 18B. In a recent publication, *The Rule of Law*,[44] this type of machinery was approved for situations where the Minister certified "that it would be prejudicial to the national security to state the facts and reasons on which his decision was founded."

It is submitted, however, that national security is not a concept of all or nothing. At the present moment the writ of habeas corpus remains in operation, and the Conference of Privy Councillors noted how any attempt to make an inroad into its sphere would certainly fail. We do not require a denial of the right to have a trained representative to ensure security. The process requires certain information to be given to the charged employee, and assumes that he may have an explanation. Having assumed that, why then must he himself alone make it?

The Government contends that the representative himself would have to be "vetted" through the security procedure. This is nonsense. Provision already has been made that no sources of information may be disclosed, and surely no secrets are going to be revealed at the hearing.

In New Zealand the opposite view is taken, for representation is allowed, but the employee himself may be excluded from the deliberations if thought to be necessary. Apparently the Dominion Government is prepared to take a little more trouble and "vet" the lawyer. Probably the most effective method of operating such a system would be through a panel of lawyers willing to take these cases.[45] These lawyers could be vetted without much trouble. At the moment, however, the Government's position is completely inconsistent, and succeeds in adopting the most arbitrary procedure possible. Having conceded the necessity of having a tribunal independent of the responsible Minister for the purpose of giving him advice, the Government nevertheless denies a procedure which

[44] *Op. cit.*, note 30, pp. 58–59.

[45] The interest in ensuring representation is so great in the United States that some foundations have made grants for aiding charged employees, and a panel of lawyers has been formed in New York City to aid defendants in industrial security cases.

would ensure an impartial tribunal and the best presentation of the case.

In addition, the Government believes that the presence of an advocate would entail a "closer cross-examination," inevitably compromising the sources of information, and that therefore men of high standing would refuse to serve on the tribunal. But at the moment the board is asked to be prosecutor, defence counsel and judge. Why should anyone refuse to take part in proceedings because his function is to arbitrate between two sides? If the case were presented by representatives to the tribunal, its responsibility would be narrowly and concretely defined. The members would be more fully able to act as true judges than under the present practice.

In the United States the procedure is geared so as to allow representation by a trained advocate of the charged employee, and his case therefore is put before the agency board with clarity. Witnesses and evidence are introduced in his behalf. Further, these arguments do not affect the points readily conceded: that the burden of proof is necessarily reversed because the tribunal is faced with deciding that a "risk" to national security exists, and that much of the information and its sources available to the Government cannot be disclosed without defeating the entire system.

It does seem that representation, far from being inconsistent with the nature of the issue involved, is a logical part of the judicial function of an administrative tribunal.

Confrontation and Information

The most difficult problems at this stage are how much confrontation of adverse witnesses or information should be granted to the charged employee, and who should have the discretion to grant it.

In the United Kingdom the latter of these two problems has occurred at the initial stage of the proceedings. A concrete protest was made in 1948 by the staff associations, that sufficient particulars of charges were not being given. The Prime Minister conceded that in four of the twenty-nine cases protested, this was so.[46]

However, during the proceedings the policy has been continued of denying all rights and thereby avoiding the difficulty of deciding what rights to allow. The issue may not seem as urgent as in the United States, in the sense that the programme is confined to work "vital to the security of the State," and the emphasis is placed on transfer and not dismissal. Potentially, however, the British system has inherent in it the identical problem. Only its application is very much more limited. In an issue involving individual rights this is irrelevant.

[46] He added he thought no material prejudice had been suffered by withholding information in these cases. He therefore refuses to reopen them.

The decision on these questions must necessarily remain with the Minister, but should not inevitably lead to denial of any identification of the source of evidence. In addition to confrontation by the charged employee, the Board could possibly be allowed or required to question a witness. Another method would be to adopt the New Zealand procedure in which the legal representative of the employee is allowed to do this. The essential safeguards should not be difficult to work out.

Also the distinctions between types of witnesses should not be ignored. There is real reason in concealing the identity of the undercover agent, but it is questionable whether a casual informer —the next-door neighbour or the butcher's assistant—should be allowed to accuse unseen. No information is available as to how much this practice is followed. The very nature of positive "vetting"—the questioning of friends and relatives—leads to a strong suspicion that in many cases this type of informer must play more than a casual role.[47]

Conclusion

To abolish the right to a trial in order to reach a verdict would lead to a simpler legal procedure. Likewise it is easier to deny all representation and confrontation before the "Three Wise Men" than to have to decide just how extensively to grant these rights, taking into consideration individual rights and national security. But we do not yet need to adopt full Communist methods to prevent Communist infiltration.

What is required is the recognition of the right of the individual to work, and the duty of the Government as a government and not as a mere employer. This would lead to that procedural justice which implies (at the very least) representation of the charged employee before the tribunal.

In the words of the late Mr. Justice Jackson of the United States Supreme Court:

> "We cannot approve any use of official powers or position to prejudice, injure or condemn a person in liberty, property *or good name*, which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth—safeguards without which no judgment can have a sound foundation."[48]

David C. Jackson.*

[47] It is to be hoped that the "professional informer" is never allowed to influence decisions as much as in the United States. The evils of a system which rests on testimony from persons who earn a comfortable living *so long* as their testimony lasts, are too obvious to need further comment.

[48] Robert H. Jackson, "The Task of Maintaining Our Liberties: The Role of the Judiciary," *American Bar Association Journal*, XXXIX (November, 1953).

* B.C.L., B.A., 1955–1956, Fellow of the Association of the Bar of the City of New York. This article resulted from information gathered while assisting in the preparation of a study of the United States Security System by a committee of the above association.

Appendix

Criteria of Presidential Executive Order 10450 (1953)

The Executive Order established these criteria as indicative of a security risk:

"1. Depending on the relation of the Government employment to the national security:

(i) Any behaviour, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

"2. Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

"3. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

"4. Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

"5. Membership in, or affiliation or sympathetic association with, any foreign or domestic organisation, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

"6. Intentional, unauthorised disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or wilful violation or disregard of security regulations.

"7. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States." (Executive Order 10450, s. 8.)

(1) (iv) was amended August 4, 1954, by Executive Order 10548, to read:

> "Any illness, including any mental condition of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings on such cases."

An eighth criterion, refusal to testify before a Congressional committee about alleged disloyalty or other misconduct, under the protection of the fifth admendment, was added October 13, 1953, by Executive Order 10491.

Information raising security questions "shall relate but shall not be limited" to, the criteria of the Executive Order. The military agencies in their regulations have considerably elaborated upon these criteria, but the net effect is the same.

LEGISLATION

The Homicide Act, 1957

On March 21 the Homicide Act, 1957, received the Royal Assent, and thus put an end, at least for the time being, to the controversy about the abolition of capital punishment which has raged almost continuously for the last ten years. Now this Act is something of a two-headed monster whose one head many will not like in the least but whose other head may fairly be described as attractive if not exactly all that it might be. I refer, of course, to the fact that the Act not only limits the liability to suffer the death penalty (in Part II) but also amends the substantive law of murder in England and Wales (in Part I). The monster also has two tails, one which amends the form of the death sentence and the notice of execution (Part III), and the other which applies the Act to Scotland (Part IV).

The attractive head (Part I) brings about certain welcome improvements in the English law of murder. It begins with the section abolishing the doctrine of constructive malice in murder by a singularly obtuse provision. Section 1 (1) says that " a person (who) kills another in the course or furtherance of some other offence " shall not be guilty of murder unless the act was done " with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence," which simply means that the ordinary common law *mens rea* for murder must be proved in every case, *i.e.*, either an intention to kill or to do grievous bodily harm. Subsection (2) equates " killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody " with a killing in the course or furtherance of an offence, which is a rather clumsy way of saying that the doctrine of constructive malice is abolished in these cases also. Let no one think that section 1 effects a complete elimination of any special rules for crimes committed in these circumstances, however, for section 5, which defines the murders which shall henceforth be capital murders, reinstates what were previously categories of constructive malice as categories of capital murder. The big difference, of course, will be that it will be necessary in all cases of murder to prove *mens rea* in the sense of an intent to kill or do grievous bodily harm.

A doubt lingers concerning the nature of the liability of an accomplice where death is caused by his partner in crime. In certain circumstances, indicated by section 5 (2), it would appear that he may be liable for capital murder constructively. The

subsection says that in the case of any murder falling within section 5 (1), if two or more persons are guilty of the murder, "it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him." No-one would object to the provision whereby it is capital murder if the accomplice has inflicted grievous bodily harm or attempted to inflict it, but where the death itself may have been caused by the act of the other or others. This renders it unnecessary to prove whose act caused the death. But to say that one is guilty of capital murder if one has simply used force on the victim in the course or furtherance of an attack on him seems to be taking liability for capital murder too far. It would appear to let in a new type of constructive crime, constructive capital murder.

The position of an accomplice in these circumstances appears to be this: for the purpose of rendering him guilty of murder the rules of the common law about the liability of accomplices will apply, but not the rules which are constructive. The Royal Commission wanted to retain the latter, but the Act does not do so.[1] It will have to be shown that the accused agreed to a common design to kill or do grievous bodily harm, and an agreement to use some degree of force would not be sufficient if a greater degree of force were eventually used which caused death, as in *R.* v. *Betts and Ridley*.[2] For the purpose of rendering him guilty of capital murder, however, it will be sufficient that the accused "himself used force" against the victim, even though by this act he may not have intended to kill or do grievous bodily harm, provided that it was in the course or furtherance of an attack on the victim. It is clearly the object of this provision to discourage the use of force, but it is submitted that it may well give rise to injustices. For example, on the facts of *R.* v. *Bentley and Craig*,[3] supposing Bentley had struck P.C. Miles as he came through the door onto the flat roof, and then Craig had shot him, it seems that Bentley would have been guilty of capital murder.

Section 2 of the Act, borrowing an idea from the Scottish law, creates a new defence of diminished responsibility, which is to be governed by the same law as to burden of proof as the defence of insanity (s. 2 (2)). This is to apply where a person kills or is a party to the killing of another yet was suffering from such an abnormality of mind at the time as to substantially impair his mental responsibility for his acts and omissions in doing or being a

[1] Report of the *Royal Commission on Capital Punishment*, 1949–1953, Cmd. 8932, paras. 121–123, p. 45.

[2] (1930) 22 Cr.App.R. 148.

[3] See *The Trial of Christopher Craig and Derek William Bentley*. Edited by H. Montgomery Hyde, 1954.

party to the killing. The intention is not to abolish the M'Naghten Rules but to supplement them by providing for cases where there cannot be said to be complete irresponsibility but there is substantial impairment. Not all such cases will be covered, however, for there is a phrase in parenthesis in the section which has the effect of requiring the abnormality of mind to arise from "some arrested or retarded development of mind or any inherent causes" or to have been "induced by disease or injury."[3a] It seems unlikely that psychopathic offenders will be covered by this provision, as it is already doubted whether they are covered by the Scottish defence. Impulsive behaviour and outbursts of temper are intended to be excluded unless they can be traced to the causes mentioned. It remains to be seen what judges will tell juries about this defence, and how juries will use it.

The effect of satisfying the jury that the situation is one of diminished responsibility is that they must convict the accused of manslaughter not murder. It is then open to the judge to impose any sentence or make any order which he has power to make on a manslaughter conviction, which gives him a very wide choice. The difficulty which will sometimes arise is that the judge will not know whether the jury held there was diminished responsibility or whether they decided that the case was manslaughter upon some other ground, *e.g.*, provocation. Indeed, they may well have decided on several grounds. The judge will have to make up his own mind about the proper penalty to impose, and there is some danger that persons suffering from diminished responsibility may receive inadequate sentences, by which is meant sentences which, when the statutory remission of one-third for good conduct has been deducted, may mean the discharge to the community of persons whose mental condition is dangerously unstable. It would have been better if the Act had required a special verdict in such cases, and the judges had been required to impose a life sentence, thus leaving it to the Home Secretary to decide, in the light of the periodic reviews which are made of all life sentences, the precise date of release.

Section 3 amends the law concerning provocation in connection with a charge of murder by recognising that "things said" as well as "things done" may amount to provocation in the eyes of the law. This amendment implements the recommendation of the Royal Commission on Capital Punishment.[4] Unfortunately, in doing so it adopts a form of words which embody the "reasonable man" test in statutory form. There is a powerful case for abandoning this criterion, although the Royal Commission did not recommend this, and it seems a pity that it should have been written into the Act.

[3a] This phrase has been borrowed from the Mental Deficiency Act, 1927.
[4] *Loc. cit.*, paras. 124–153, pp. 47–56.

Section 4 provides that henceforth it shall not be murder but manslaughter to kill another or be a party to killing another in pursuance of a suicide pact. The Act provides a test to assist one in determining whether a person was acting in pursuance of such a pact, and leaves it to the defence to prove that these were the circumstances in which the death occurred. This amendment of the law goes somewhat further than the Royal Commission's recommendations,[5] and is to be warmly commended. The provision may call for some interpretation, but it removes one of the fiercest and least necessary rules of the English law of murder.

On the whole, Part I is to be regarded with approval, qualified only by some doubts about the meaning and effect of sections 2 and 4, and regrets concerning the scope of section 3. The same cannot be said with regard to the other head, Part II, from whichever point of view it be regarded. If one is an abolitionist, one may regret that the abolition effected by section 7 has been qualified by the retention of the categories of capital murder in sections 5 and 6. If one is a retentionist, one may regret section 7, or one may accept that a limitation of capital punishment is desirable but be dissatisfied with the categories listed as capital murders. How many who voted for the Bill were completely happy about these? Even if one tries to approach the subject dispassionately, on the assumption that certain murders ought to remain capital, one finds it hard to understand why murders in the course of rape or by poisoning are not capital unless they constitute second murders under section 6 or come under section 5 for some other reason.

Section 5 (1) (*a*) makes murders done in the course or furtherance of theft capital. Theft is defined to include any offence which involves stealing or is done with intent to steal. All cases of robbery, and most cases of burglary, housebreaking and sacrilege would be included. So also might blackmail under section 30, Larceny Act, 1916 (demanding with menaces or by force with intent to steal). The exclusion of deaths caused in furtherance of felonies in general reflects the intention of the sponsors of this measure to confine the capital provisions to those thought absolutely essential to deter the professional criminal from using force. He is usually out for gain, and steals or intends to steal.

Section 5 (1) (*b*) covers murder by shooting or causing an explosion. Murder by other methods is not capital unless it comes within one of the other provisions, thus murder by stabbing, strangling, and poison are excluded.

Section 5 (1) (*c*) covers murder in the course or for the purpose of resisting lawful arrest or effecting an escape. This covers situations like *R.* v. *Porter*[6] and *R.* v. *Appleby*.[7]

[5] *Loc. cit.*, para. 176, p. 63.
[6] (1873) 12 Cox 444.
[7] (1940) 28 Cr.App.R. 1.

Section 5 (1) (*d*) would at first sight appear superfluous, as it covers the murder of a police officer acting in the course of his duty or of a person assisting a police officer so acting, and one would have thought the situation was adequately provided for in section 5 (1) (*c*). But closer examination reveals that 5 (1) (*d*) is considerably wider than (*c*), and covers, *e.g.*, the murder of a police officer who stops a motor-car and asks the driver for his licence and his name and address.

Section 5 (1) (*e*) extends the same protection which is afforded to the police to prison officers murdered by prisoners (but not by outsiders), while acting in the execution of their duty. Persons assisting a prison officer so acting are also protected, which would presumably cover a probation officer visiting a prison, or another prisoner. But such persons do not appear to be protected when at the time of the murder they are not assisting a prison officer in the course of his duty.

Section 5 (2) is the provision concerning accomplices and capital murder which has already been discussed in connection with section 1.

Section 6 places a premium on simultaneous (as opposed to consecutive) extinction of one's enemies by making it capital to commit a second murder in the case of any person who has been convicted of another murder "done on a different occasion." But both murders must have been committed in Great Britain. The intention of the section is to cover the situation whereby a person who has been convicted of one murder and has received a life sentence, upon release to the community may be tempted to commit further murders. What constitutes a different occasion may give rise to some problems, and it is not difficult to imagine bizarre situations giving rise to serious anomalies. But this is characteristic of the whole of the capital murder provisions, as we have attempted to explain.[8]

Sections 7 and 9 together effect the abolition of the capital penalty for all cases where it is not retained under sections 5 and 6, and the substitution of a mandatory life sentence for such cases. Section 8 extends the same general law to courts-martial.

The tails of the Act are not so remarkable as the two heads, and it is sufficient to note that Part III simplifies the form of words used in sentencing a person to death (s. 10) and alters the form of notice that an execution has taken place, abolishing the posting of the notice on the prison gate (s. 11). Section 12 provides for the avoidance of double executions. Part IV simply applies the Act to Scotland, with the exception of Part I. It does not extend to Northern Ireland except as regards courts-martial.

There was some criticism in the House of Commons of the

[8] A fuller analysis and discussion of the Act by the present writer appears in the *Howard Journal*, Vol. IX, No. 4, 1957, pp. 285–299.

provisions governing the application of the Act to cases pending at the time of its commencement,[9] but so far as the writer is aware no difficulty was experienced in the transition from the old law to the new, despite parliamentary forebodings. Now that the Act is law, several questions remain to be answered. How many persons will be found guilty of capital murder and sentenced to death, and in how many cases will such sentences be carried out? Will the Home Secretary feel justified in advising the exercise of the prerogative of mercy in similar cases and on similar grounds to those previously considered to demand a reprieve? (It would appear that he has no intention of altering his very careful consideration of each case on its merits. The complaints which have been made about the exercise of the prerogative are largely irrelevant.) What will the courts make of the new defence of diminished responsibility? It is time we got away from the strictness of the M'Naghten formula, but it remains to be seen how far the courts will be prepared to go in developing a humane jurisprudence consistent with the best modern medical knowledge.

J. E. Hall Williams.*

A Psychiatrist's Footnote

The interest of a psychiatrist in section 2, dealing with the defence of "diminished responsibility," divides itself according to the two medical functions of diagnosis and treatment.

Subsection (1), which defines diminished responsibility, brings up the whole difficult problem of deciding what bearing a person's mental state has on his responsibility for what he does. Here psychiatric knowledge will continue to help the judge to guide the jury; but the situation remains unchanged, although, perhaps, the urgency to avoid a mistake is reduced, except in those cases where the penalty still remains capital.

Subsection (3), dealing with the punishment to be awarded, appeals to his interest in therapy. A verdict of "guilty but insane" introduced the notion of illness. To be committed as a Broadmoor patient implied medical treatment. How useful to the mental health of a person severely disturbed in mind is it to serve a term of imprisonment for manslaughter? If the culprit is so seriously defective as to be judged of reduced responsibility, he is unlikely to benefit from imprisonment and will probably embarrass the administration. If he is suffering from an acute and possibly curable mental illness, such a sentence, unless it bears the rider that the guilty person shall be removed forthwith as a patient to a mental hospital, might bring about a permanent damage to his health or even a catastrophe.

J. C. Read.

[9] See s. 16.

* Lecturer in Law, London School of Economics and Political Science.

NOTES OF CASES

The Aftermath of the Adams Case

It is not often that a case which titillates the public's thirst for sensation has interesting legal implications. The recent trial of the Eastbourne doctor was exceptional in this, and other, respects. True, at the trial itself no legal questions of any interest were raised—though they might have been had the prosecution continued to lead evidence regarding the deaths of other patients as they had before the examining magistrates. The legal interest of the case lies principally in the fact that it drew attention in an extreme form to the possible injustices which may flow from our practice of hearing the preliminary proceedings before the magistrates in open court and permitting them to be fully reported.

Magistrates already have power to hear these proceedings *in camera*,[1] but hitherto this power has hardly ever been exercised. In the *Adams* case the defence argued strongly that some part at any rate of the evidence (that relating to the deaths of other patients) should be heard in private, but the magistrates refused notwithstanding the highly prejudicial character of this evidence and the fact that its admissibility was the subject of argument. The whole of these proceedings were accordingly reported at enormous length in all the national newspapers—and indeed, in some foreign ones. Dr. Adams was committed for trial. At the trial the prosecution's case was developed on lines quite different from those adopted in the preliminary hearings, and no evidence at all was given about other patients. Inevitably, however, most if not all, members of the jury must have read the earlier reports and remembered the evidence which they were now told to exclude from their minds.

It was in these circumstances that the learned judge (Devlin J.), speaking with the approval and authority of the Lord Chief Justice, made his important pronouncement[2] that he thought it would have been wiser had the magistrates' proceedings been heard in private. He emphasised that the preliminary hearings were designed for the protection of the accused and ought not to operate to his prejudice. This statement has already had some effect; the preliminary proceedings in at least one murder case have been heard wholly or partly in private, and the Home Secretary has appointed a Departmental Committee under Lord Tucker to

[1] This power has recently been expressly re-enacted in the Magistrates' Courts Act, 1952, s. 4 (2).

[2] *The Times*, April 9, 1957.

consider the whole problem of limiting reports of proceedings before examining magistrates.[2a]

As always when this matter is broached it has produced cries that the freedom of the press is in danger. Perhaps the most balanced and responsible expression of this view has come from the Press Council which issued a statement on the subject on May 1.[3] Their arguments are summarised below, with comments.

1. The opening of the case before the magistrates imposes a salutary check on the injustices of gossip.

Doubtless any alleged murder, sexual assault, or the like, leads to local gossip. Certainly in the *Adams* case there was plenty of gossip before any proceedings were taken. But can it seriously be suggested that this gossip is checked by the publication of reports of the preliminary hearings? Rather it is enormously stimulated and spread abroad over a much wider area. The increased gossip is based on a necessarily one-sided account; that of the prosecution, whose allegations and evidence are thereby implanted in the minds of those who read them. Speculation about guilt or innocence is inevitable. The dangers of this speculation are aggravated because the public do not fully understand that they *are* only being given *one* side of the picture.

2. Witnesses are sometimes prompted by reading reports of the preliminary hearings " to come forward, not always for the defence, with valuable evidence."

This is an old argument usually stated in the form that the accused benefits because of the possibility that a surprise witness will come forward to clear him. Expressed thus the argument is easily answered in a way which does not suit the press: Leave it to the defence to say whether they wish the proceedings to be reported or not. Hence, no doubt, the formula adopted by the Press Council, which recognises that the witness may equally well come forward for the prosecution. This, however, puts a novel complexion on preliminary proceedings. Hitherto it has always been understood (as Devlin J. pointed out) that they are intended to protect the accused by ensuring that he shall not be subjected to the perils and expense of a trial by jury unless the prosecution can prove a prima facie case. The Press Council, apparently, wish to convert them into a kind of advertising campaign for missing witnesses. They are not appropriate or needed for this purpose. If the police lack a witness they can, and do, issue press statements asking him to come forward.

The whole of this argument is specious. Occasions on which witnesses come forward solely as a result of reports of the preliminary hearings are rare indeed. Occasions on which their

[2a] For the members of the committee and the amended terms of reference, see *The Times*, June 7, 1957.
[3] See *The Times*, May 2, 1957.

evidence is valuable are rarer still. Even if they miss the opportunity to come forward then, they have plenty more before the conclusion of the trial itself—no one has suggested that this should not be reported. We are being asked to assume circumstances, each of which is unlikely in the extreme and which in combination must be quite unheard of: (a) a witness has valuable evidence; (b) the police do not know that he has it, or, if they do, their inquiries for him do not come to his attention; (c) he reads the reports of the preliminary hearings but not any reports about the case prior to those hearings; (d) he would not have read any later reports or heard about the case in any other way!

3. If the general public are admitted but press reports curbed there will be inadequate and often misleading reporting by word of mouth.

If there is anything in this, it is an argument for hearings *in camera* rather than an argument against curbing press reports. But what it overlooks is that a press report will have a wide circulation and probably be read by those who subsequently sit on the jury, whereas the oral report is never likely to reach their ears. And unless the press report is verbatim (which it cannot be) it too will be "inadequate" and therefore to some extent "misleading."

4. Faith in trial by jury rests upon the proved ability of juries to respond to the directions of the judge . . . , to come to their verdict on evidence they have heard, and that evidence alone, disregarding whatever they may have heard or read elsewhere.

If faith in trial by jury in fact rests on this, our faith is sadly misplaced. The alleged "proved ability" has in fact been pretty conclusively disproved; investigation of the behaviour of juries [4] has shown that the one way of ensuring that a piece of evidence is indelibly imprinted on their minds is for the judge to direct them to forget it. Nor need this surprise us. Totally effacing from one's mind something to which attention has been emphatically drawn involves a degree of sophistication of which even the trained lawyer knows himself to be incapable.

5. It is important that the work of J.P.s should be done within the full knowledge of the public.

Indeed it is. But it is relatively unimportant on those occasions when their work will subsequently be reviewed by a higher court, as it will be if they commit for trial (if they refuse to do so there may be a case for allowing reporting). The sanction of public scrutiny is needed principally in cases disposed of summarily by the J.P.s. No one has suggested that these should not be

[4] For example, the elaborate investigation being undertaken at the University of Chicago.

reportable; the pity is, perhaps, that they are rarely of sufficient public interest to be reported adequately.

All these arguments, and many more, will doubtless be considered by the Tucker Committee. Doubtless, too, it will be strenuously argued before them that the theoretical objections to pre-trial publicity, such as that which took place in the *Adams* case, are sufficiently refuted by the fact that Dr. Adams after all was acquitted. But he owed his acquittal to a combination of three factors, apart from the weakness of the prosecution's case right from the beginning: (1) the brilliant handling of the defence, (2) the masterly conduct of the trial by the learned judge, and (3) perhaps most of all the fortuitous preservation of the nurses' notebooks. Had any of these factors been missing one has a haunting fear that an innocent man might have been convicted. In any case, the ultimate result is really beside the point. Our modern conception of trial by jury is based upon the assumption that the jurors approach the hearing without any preconceived ideas about the case. It seems impossible that the *Adams* jury could have done so. Throughout the weeks of the preliminary hearings the case had been the major news item in the papers and a heated topic of conversation in most homes and suburban trains. Most of us had come to some provisional conclusions, and it is inconceivable that the jurors at the Old Bailey did not start with some prejudices. Whether these were pro or con Dr. Adams is beside the point. Whether, in the rather exceptional circumstances of the case, they would not have had some vaguer prejudices anyway, is equally beside the point. The reporting of the preliminary hearings made it impossible for them to start with open minds. And the same inevitably applies to any sensational case—Rouse, Christie, Ellis. . . .

Apart from the question of publicity, the *Adams* case aroused misgivings in legal circles about certain aspects of the handling of the case by the prosecution. Some of these misgivings were allayed by the Attorney-General's statement during a debate in the Commons.[5] But not all. The prosecution may not have opposed the application for a hearing *in camera*, but they certainly did not urge the magistrates to accede to it. In the circumstances should they not have done so? Why should the prosecution have taken a different view from that of the Lord Chief Justice and Devlin J.? The great disadvantage of leaving this decision to the discretion of magistrates is that they are but human beings, prominent probably in local politics and reluctant to renounce the spotlight—without active encouragement from both parties. Why, too, if evidence relating to the deaths of other patients was excluded from the final trial because its prejudicial effect on a lay jury

[5] 569 H.C. Debs., cols. 292–334 (May 1, 1957).

would be out of proportion to its probative force,[6] did not similar considerations apply to the hearing before the lay magistrates? And is it fair to obtain a committal on one basis and then to adopt an entirely different one at the trial? Does this not defeat the two objects of the preliminary hearing, namely to enable the magistrates to decide whether the case is fit to go before a jury, and to enable the accused to know the nature of the case he has to answer?

L. C. B. G.

Separation of Powers in Australia

In English constitutional theory, discussion of the doctrine of the separation of powers has been mainly concerned with the conferment of legislative and judicial functions on the executive branch of government. It is sometimes overlooked that in its strictest form the doctrine also precludes the conferment of non-judicial powers on courts. In the American Constitution, Article I vests the legislative power in Congress, Article II vests the executive power in the President and Article III vests the judicial power in a Supreme Court and inferior courts established by Congress. Among the inferences drawn from this distribution of authority are that it is unconstitutional for the judicial power of the United States to be vested in bodies that are not courts, and for the courts of the United States to be given functions that are not judicial. The form of the Constitution of the Commonwealth of Australia is modelled partly on that of the United States. Chapter 1 vests the legislative power of the Commonwealth in the Federal Parliament; Chapter 2 vests the executive power of the Commonwealth in the Queen; Chapter 3 vests the judicial power of the Commonwealth in the High Court, other federal courts created by Parliament and other courts invested by it with federal jurisdiction (s. 71). Judges of the High Court and other federal courts must hold office for life subject to removal on addresses from both Houses of Parliament for misbehaviour or incapacity (s. 72). Chapter 3 defines the content of the judicial power of the Commonwealth. Section 51 (xxxix), which is contained in Chapter 1 of the Constitution, empowers Parliament to make laws with respect to matters incidental to the execution of powers vested by the Constitution in the federal judicature. The Constitution makes no other provision for the judicial power of the Commonwealth.

In a number of decided cases a series of propositions had been laid down regarding the conferment and exercise of the judicial power of the Commonwealth. Thus, its content was exhaustively defined by Chapter 3; it was exercisable only by courts staffed

[6] This was the explanation advanced by the Attorney-General in the House of Commons debate: *ibid.*, col. 322.

by judges holding office in accordance with section 72; the power of a tribunal to punish or to enforce its own awards was part of the judicial power, but the function of making arbitral awards was not. But it had never been held, nor did the Constitution expressly provide, that a federal court could not be given non-judicial functions. Indeed, the contrary assumption had long been made. The Commonwealth Parliament had set up the Commonwealth Court of Conciliation and Arbitration to discharge functions with respect to the prevention and settlement of industrial disputes extending beyond the limits of any one state (see Constitution, s. 51 (xxxv)). The court had power to enforce its own awards, and admittedly exercised both judicial and non-judicial functions. In *Waterside Workers' Federation of Australia* v. *Alexander* [1] it was held that the court's judicial powers of enforcement had been invalidly conferred, mainly (it appeared) on the ground that the judges of the court did not enjoy life tenure. In 1926 the court was reconstituted so that its judges should enjoy life tenure, and it was designated as a superior court of record. During the following thirty years a very liberal interpretation was given to the statutory powers of the court, and it came to occupy a leading place in the industrial and general economic life of Australia. Many decisions of the High Court rested on the assumption that the combination of judicial and non-judicial power in the Arbitration Court was constitutionally valid, but not until 1955 was this combination of powers directly questioned before it. Then, in *R.* v. *Kirby, ex p. Boilermakers' Society of Australia*,[2] the High Court, by a four to three majority, held that the Arbitration Court was not validly constituted to exercise the judicial power of the Commonwealth, and granted writs of prohibition to restrain it from proceeding further with orders requiring a trade union to comply with one of its awards and fining the union for contempt of court. The decision of the High Court was affirmed on appeal by the Judicial Committee of the Privy Council in *Att.-Gen. for Australia* v. *The Queen and the Boilermakers' Society of Australia*.[3]

The decision in the *Boilermakers'* case is based on implications drawn from and read into the Constitution. The Constitution embodies the principle of the separation of powers by assigning the three functions of government to the corresponding organs of government; the only source of the judicial power lies in Chapter 3; section 51 (xxxix) expressly authorises the conferment upon courts of powers that are ancillary or incidental to their judicial powers; by implication the Constitution prohibits the conferment upon courts of non-judicial powers that are not merely ancillary; *a fortiori*, it prohibits the conferment of judicial powers upon a body which, although designated as a court and invested with some of

[1] (1918) 25 C.L.R. 434.
[2] [1956] Argus L.R. 163; 94 C.L.R. 254.
[3] [1957] 2 W.L.R. 607; [1957] 2 All E.R. 45.

the outward characteristics of a court, exists primarily for the exercise of non-judicial functions.

The judgment of the Board, delivered by Viscount Simonds, follows fairly closely the main lines of the majority judgment of the High Court of Australia—a judgment which, it may be said, is one of the most formidable essays in analytical logic ever to have issued from a British court. To comment fully on the judgments would be inappropriate in this note. However, the following observations may be made. First, there have been a number of dicta to the effect that the Australian Constitution does not embody the doctrine of the separation of powers in its strictest sense. This is certainly true of the allocation of executive and legislative powers, and the High Court has held that legislative powers may validly be delegated to the Executive. The explanation now given for this exception is that the Australian Constitution, unlike the American, incorporates the British principle of responsible government, and that the repository of delegated legislative power is subject to a constitutional check by virtue of his answerability to the legislature. But the Judiciary, especially in a federal system, stands in a special position: "The absolute independence of the Judiciary is the bulwark of the Constitution against encroachment, whether by the Legislature or by the Executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."[4] Secondly, the independence of the Judiciary survives in the United Kingdom, where there is no impediment to giving courts functions that would not ordinarily be classified as judicial (*e.g.*, the former Railway and Canal Commission and the new Restrictive Practices Court; *sed quaere* whether in Australia these would be regarded as courts within the meaning of Chapter 3); and it survives in Canada, a federal country in which there is no corresponding implied prohibition affecting the legislative competence of the Federal Parliament. Thirdly, as far as the judicial power is concerned, the doctrine of the separation of powers is now applied more rigidly in Australia than in the United States, where certain deviations from the narrow path have been accepted for reasons of convenience.[5] But the inconvenience of this result was not a factor which weighed with either the majority of the High Court or the Judicial Committee. A rigorously analytical approach, supported by certain basic assumptions about the place of the Judiciary in a federal system, was preferred. Fourthly, before judgment was delivered the Commonwealth Parliament had redistributed the functions formerly combined in the jurisdiction

[4] [1957] 2 W.L.R., at 619.

[5] See Corwin (ed.), *The Constitution of the United States*, pp. 533 *et seq.*, 623 *et seq.*; Harris, *The Judicial Power of the United States*, Chap. 4; *Ex p. Bakelite Corporation*, 279 U.S. 438 (1929); *Williams* v. *U.S.*, 289 U.S. 553 (1933); *O'Donoghue* v. *U.S.*, 289 U.S. 516 (1933); *National Mutual Insurance Co. of the District of Columbia* v. *Tidewater Transfer Co.* 337 U.S. 582 at 590–600.

of the Arbitration Court and had vested them in three distinct tribunals.[6]

The respondents to the appeal (who were not represented by counsel) took the preliminary point that the appeal was not competent inasmuch as it raised a question as to the limits of the powers of the Commonwealth and the states *inter se*, so that a certificate of the High Court was required (by section 74 of the Constitution) before an appeal could be lodged. The Judicial Committee, applying a test adopted in earlier cases, held that no *inter se* question arose because neither the paramount legislative powers of the Commonwealth nor the concurrent legislative powers of the States could have been effectively enlarged or diminished by the result of the appeal. The Board's decision was not that the Commonwealth lacked power to provide for the enforcement of arbitral awards or for the punishment of breaches of such awards; it was merely that the Commonwealth could not combine such powers with the arbitral function in the same tribunal. The decision affected not the total content of the Commonwealth powers but the manner in which they were to be exercised.

S. A. de Smith.

Administrative Finality and Judicial Review

In *R.* v. *Medical Appeal Tribunal, ex p. Gilmore*[1] the Court of Appeal moved a stage further along the road towards the assertion of a general supervisory jurisdiction over findings of law made by administrative tribunals. As is well known, in the absence of a right of appeal to the courts, errors of law made by inferior tribunals are immune from attack by means of certiorari unless the error leads to a jurisdictional defect or is apparent on the face of the record of the tribunal. The *Gilmore* case shows that the jurisdiction of the superior courts to quash for error of law on the face of the record is not taken away where the decision of the inferior tribunal is expressed to be "final." It also indicates that the courts will give a broad interpretation to the concept of the "record."

In 1936 the applicant, G., had sustained injuries to both eyes while at work, and had been almost blinded in the right eye. In 1955 he sustained further injuries to his eyes while at work, and became nearly blind in his left eye also. Regulations made under the National Insurance (Industrial Injuries) Act, 1946, provided that a person who, in an industrial accident, had suffered injury

[6] Namely, the Commonwealth Court of Conciliation and Arbitration, the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court; see now the Conciliation and Arbitration Act, 1904–1956 (consolidation).

[1] [1957] 2 W.L.R. 498; reported *sub nom. Re Gilmore's Application* [1957] 1 All E.R. 796.

to one of two paired organs of which the other was already disabled as a result of a prior defect, injury or disease, was entitled to have his entitlement to benefit assessed as if the prior disability had been incurred as a result of the subsequent injury. Since G. was now incapable of working, his disablement should have been assessed at 100 per cent. for the purpose of an award. He appeared before three medical boards, the last of which made no disablement award at all. He then appealed to one of the medical appeal tribunals set up under the Act. The tribunal asked a specialist to examine him; the specialist's report, which set out all the relevant facts, was favourable to G. Nevertheless, the tribunal assessed his disablement at 20 per cent.

By regulations made under the Act, the tribunal was required to record its decision in writing, together with a statement of reasons including its findings on all material facts. It did not set out fully the material facts, though it included one sentence from the specialist's report; nor did it refer to the relevant regulations relating to paired organs. By sections 36 (2) and 40 of the Act its decision was expressed to be final, subject to a further review by a medical board where the decision had been given in consequence of non-disclosure or misrepresentation of material facts. G. unsuccessfully sought this further review. Having exhausted the prescribed administrative remedies, G. moved out of time for leave to apply for certiorari to quash the original decision of the medical appeal tribunal. The Divisional Court rejected the request, but the Court of Appeal granted it and gave an extension of time. At the hearing of the substantive application, counsel for the Ministry of Pensions and National Insurance conceded that the decision of the tribunal was erroneous in law; the court, however, decided to reserve judgment. All members of the court (Denning L.J. (as he then was), Romer and Parker L.JJ.) agreed in allowing the application to quash.

The first question was whether there was an error of law on the face of the record. Denning L.J. (with whom the other members of the court concurred) held (i) that although the error was not fully disclosed by the tribunal's adjudication, the inclusion of an extract from the specialist's report made that report (which embodied all the material facts) part of the record; and (ii) that, when the report was read together with the decision, it became apparent that the conclusion was one which no reasonable person who properly understood the relevant regulations could have come to (*cf.* the income tax case of *Edwards* v. *Bairstow* [2]); so that the tribunal's erroneous conclusion could be regarded as an error of law on the face of the record.

If a similar situation had arisen in connection with an arbitrator's award, it is not improbable that a court would have treated

[2] [1956] A.C. 14.

such an error as one apparent on the face of the award. In any event, as Denning L.J. pointed out, since the tribunal was under a statutory duty to set out their finding on all material facts the court could have ordered it to complete the record. But his Lordship's further assertion (see also his dictum in the *Northumberland* case [3]) that the courts have an inherent power to order inferior tribunals to complete their records is supported only by precedents relating to inferior courts *stricto sensu*, which cannot be equated for this purpose with administrative tribunals. As the law stands at present, it is thought that an administrative tribunal cannot in general be compelled to confess its errors; it is at liberty to remain a peccant sphinx.

That the court should have held that the words giving finality to the tribunal's decisions did not take away the right to issue certiorari to quash for patent error of law is not surprising. In *R.* v. *National Insurance Commissioner, ex p. Timmis* [4] the interpretation to be given to similar words was expressly left open; but in a long line of cases it had been held that certiorari to quash for jurisdictional defects was not taken away by such a formula, and there was also some authority to the effect that the right to certiorari for patent errors of law not going to jurisdiction was also unaffected. The court in *Gilmore's* case chose to follow these precedents and to proceed on the assumption that Parliament, by continuing to employ the same formula, had by implication accepted the interpretation that had been placed upon it. It cannot be disputed that this assumption was permissible; yet it has an air of unreality in this context. If Parliament provides that the decision of a tribunal shall be final, it is also permissible to assume that it has intended that some meaning shall be attributed to its words. A provision that the decision of a tribunal shall be final cannot be intended to take away any right of appeal, for a right of appeal does not exist unless it has been expressly conferred by statute. Unless, then, the words are to be treated as surplusage, the presumed intention of Parliament must be to oust or attenuate the supervisory jurisdiction of the courts. But it was well known in 1946 that a finality clause did not take away certiorari for jurisdictional defects; and it is equally notorious that the jurisdiction of the courts to quash for error of law on the face of the record had been overlooked and was not rediscovered until 1951. Reliance upon guesses about parliamentary intent does not, therefore, carry us very far. This alone seems clear: that when Parliament expressly conferred rights of appeal on points of law to the High Court against certain of the decisions made under the National Insurance Acts—rights of appeal that were far less comprehensive than those formerly enjoyed under the Workmen's Compensation Acts, which had become overlaid with a mass

[3] [1952] 1 K.B., at 352.
[4] [1955] 1 Q.B. 139.

of judicial precedents established after protracted and costly litigation—it did not envisage that the courts would proceed to assert a common law jurisdiction to quash other decisions made under the Acts for patent errors of law. The Court of Appeal, however, regarded the assertion of that jurisdiction to be a matter of public policy. This view was put most strongly by Romer L.J., who said that " it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law. Parliament can, of course, make them so; but it is clear . . . that a legislative intention to do so is not sufficiently expressed by the mere provision that the decision of such and such a tribunal shall be ' final.' "

There is nothing in the judgments to show that the court was prepared to draw a distinction, for the purposes of determining the proper scope of review, between tribunals consisting wholly or mainly of laymen [5] and tribunals (*e.g.*, the national insurance and industrial injuries commissioners) consisting of professional lawyers. A wide range of determinations (including decisions of the Minister of Housing and Local Government on planning appeals) are now subject to review for patent error of law although expressed to be " final." It is not clear what form of words will be apt to exclude review for patent error of law. Denning L.J. left open the effect of words that expressly take away the right to certiorari. The effect of the words " shall not be questioned in any legal proceedings whatsoever " has yet to be considered in any reported case concerning administrative tribunals. Although these words were held to exclude judicial review in *Smith* v. *East Elloe R. D. C.*,[6] the order impugned in that case was one made by an authority exercising wide discretionary powers and the statutory time limit for questioning the order had been exceeded; it does not follow that the same formula would necessarily protect every order made by a statutory tribunal exercising functions of a judicial character. One may surmise that in a case of this type a court would be more readily persuaded to intervene on jurisdictional grounds than on any other ground. But the distinctions between errors going to jurisdiction and errors not going to jurisdiction, and between patent and latent errors of law, have now worn very thin.

S. A. DE SMITH.

STRENGTHENING " ANCILLARY REMEDIES "

BY reversing the decision of the Divisional Court in *Wood* v. *Wood*,[7] and restoring the judgment of the magistrate at first instance,

[5] Medical appeal tribunals consist of a chairman (who need not be legally qualified) and two medical practitioners.
[6] [1956] A.C. 736.
[7] [1956] 3 W.L.R. 887; [1956] 3 All E.R. 645, discussed in (1957) 20 M.L.R. 163 and (1957) 73 L.Q.R. 29.

the Court of Appeal [2] has applied modest realism to remove from the face of the law a disfigurement inflicted in the great names of the unity of the family [3] and the comity of nations.[4] Since the court's decision was, moreover, unanimous,[5] no dissenting dicta remain as a focus for future trouble in this—albeit restricted—area.

The decisions reached may most usefully be classified under the headings adopted by Hodson L.J. in his closely knit judgment,[6] *viz.*—

(1) An order for maintenance obtained by a married woman in the English courts under the Summary Jurisdiction Acts [7] survives a subsequent divorce decree. *Bragg* v. *Bragg* [8] is approved and confirmed.[9] Fortunately, however, the Master of the Rolls found it unnecessary for the English courts to accept hereby the so-called doctrine of divisible divorce.[10] For legal purposes, precision is the overriding requirement of language, even if it is obtainable only at the expense of the dramatic colourings of American phraseology.

(2) This is so whether the wife was petitioner or respondent in the divorce proceedings, at least where, as in this case, there was no imputation of guilt in the wife.[11] Such questions as who divorced whom and why are merely factors for consideration in the exercise of the court's discretion as regards maintenance.

(3) The answer is the same when the subsequent divorce decree is obtained in a foreign court, at least so long as there is no evidence that the foreign court considered and adjudicated upon

[2] [1957] 2 W.L.R. 826; [1957] 2 All E.R. 14.

[3] This is the basis for the husband's unrestricted power to impose on his wife and children any domicile he may choose. See, *e.g.*, Report of the Royal Commission on Marriage and Divorce, Cmd. 9678, para. 820: " . . . however much of an anachronism the theory of the unity of husband and wife may be, it is none the less true that there is and must be unity of marriage." In the present case it was this " unity " that was transported to the state of Nevada by an adulterous husband and there dissolved without notice to the other parties who derived their status from it, as a prelude to escaping, *inter alia*, from his liability to maintain his lawfully begotten children during infancy.

[4] See [1956] 3 W.L.R. 895, and Ormerod L.J. [1957] 2 W.L.R. 852. That the Nevada courts are mere instruments in a luxury traffic in divorce, aimed principally at fostering a high-priced tourist traffic in their state, would probably not be denied by those who contend that comity nevertheless demands the international recognition of their decrees.

[5] Lord Evershed M.R., Hodson and Ormerod L.JJ.

[6] [1957] 2 W.L.R. 845.

[7] 1895–1949.

[8] [1925] P. 20.

[9] [1957] 2 W.L.R., *per* Lord Evershed M.R., p. 834; *per* Hodson L.J., p. 846; *per* Ormerod L.J., pp. 850–851.

[10] *Ibid.*, p. 840: " a phrase which I prefer for myself to avoid, save so far as it serves to distinguish, in the case of a divorce, between matters purely of status on the one hand, and matters of personal rights and obligations on the other, which flow from or are involved in a decree." *Cf.* Hodson L.J., p. 846: " the result of what is called in the United States ' divisible divorce ' . . . "

[11] *Per* Lord Evershed M.R., p. 839; *per* Hodson L.J., p. 847: " The ground of three years' separation involves no imputation of guilt "; *per* Ormerod L.J., p. 852: " My view in these circumstances is that the wife is in the same position as she would have been if her marriage had been dissolved in this country in proceedings in which she was the innocent party."

claims for maintenance.[12] Phrases used in the order for dissolution of the marriage, such as that "the said parties are hereby released from all the obligations thereof and restored to the status of single persons," will not be permitted to obscure the precise questions considered and adjudicated upon by that court. This is a minor result of the realistic atmosphere in which the case was decided.

(4) The English courts are under no obligation to discharge the maintenance order once they have been informed of the divorce but the magistrates' courts have a discretion to discharge the order in these circumstances.[13]

The result is that "ancillary remedies" may have greater powers of endurance in the country where dependants live than decisions affecting their status, a most desirable result so long as English law persists in submitting questions of status in general to the jurisdiction of a fanciful domicile, whilst "ancillary remedies" are governed by the facts of actual residence.

Other welcome features of the judgments of the court are the references at some length to academic writings on the questions under consideration, and the citation of decisions of courts in the United States which have already grappled with some success, despite the fetters of their Constitution, with the Nevada traffickings in divorce. Thus, Lord Evershed M.R. relied heavily in his judgment on the contribution to the subject made by Professor Goodhart in the *Law Quarterly Review*,[14] and referred to a note in the *Harvard Law Review*,[15] whilst Hodson L.J. quoted at some length

[12] *Per* Lord Evershed M.R., p. 839: "If, according to the terms of the statute, the discretion survives and was intended to survive the cesser of the marriage status, it must in my judgment follow that it is immaterial whether that cesser has been brought about by an English or a foreign decree; though I do not, of course, doubt that the proved incidents of the foreign decree, so far as relevant to questions of maintenance (including convenience), will be matters proper to be taken into account in the exercise of the discretion," and at p. 837: "In the present case, it would obviously be a somewhat cynical disregard of realities to suggest, on any ground of convenience, that the wife, who appears in this court as a legally aided litigant, should make her way to the court of Nevada and seek there to exercise such rights (if any) as she, an Englishwoman now domiciled in England, may have to receive support there from her former husband." *Per* Hodson L.J., p. 848: ". . . Here there was no evidence that the Nevada court ever entertained, much less adjudicated upon, a claim for maintenance and there is no reason on this account why any discretion there may be to keep the order alive should not be exercised in favour of the wife." *Per* Ormerod L.J., p. 853: ". . . it is difficult . . . to see why the decree of the Nevada court which admittedly put an end to her married status should be allowed to interfere with a personal right which the wife has in this country for maintenance under an order made in pursuance of a statute."

[13] In the exercise of this discretion the Court of Appeal made it clear that the magistrates are entitled to take into account, in addition to the matters referred to under headings (2) and (3) above, the fact that the wife respondent had no knowledge of the divorce proceedings abroad, and the grounds on which the divorce was granted. Thus, Hodson L.J., at p. 850, expressly dissented from the decision of the Divisional Court in *Mezger* v. *Mezger* [1937] P. 19 that magistrates are not entitled to take into account the fact that a dissolution of marriage has been obtained abroad on grounds that would not suffice in this country.

[14] (1957) 73 L.Q.R. 29.

[15] (1956) 69 Harvard L.R. 1497.

from Dr. John Morris's article in the *British Year Book of International Law*.[16] All three members of the court referred to the American decisions in *Estin* v. *Estin* [17] and *Vanderbilt* v. *Vanderbilt*,[18] and Lord Evershed M.R. also considered in detail the dissenting opinions in the former case.[19] It may be that this tendency to discard the blinkers of binding domestic precedent in favour of a wider conspectus is not unconnected with the fact that the case under consideration involved the conflict of laws, in which the opinions of text writers and their constant references to the decisions of foreign tribunals faced with similar problems have established a tradition of unusual authority. One result of this approach was that two members of the court showed an awareness of a gap in our law, by which it would have been impossible for the English courts to award maintenance for the wife and children under the Summary Jurisdiction Acts [20] if the divorce decree had been obtained before the jurisdiction of the English courts had been invoked.[21] Although the English courts will not be bound by the question of who invoked status proceedings, they are still tied by the consideration of which parent got his blow in first.

No less welcome is the recognition by Lord Evershed M.R. of the unsatisfactory state of the law in which maintenance for infant children, lawfully begotten, may be affected by status proceedings between their parents. Thus, in summarising the decision of the Divisional Court he said: "It will not escape attention that if this conclusion and the grounds for it are correct, then it is necessary for the courts of this country to say . . . that the Nevada decree must be taken, in effect, to have put an end to the provision made for the maintenance of the two children living in this country and also (I assume) disabled the wife, though innocent of any matrimonial offence, from seeking any new order under the proviso to section 7 for the children's benefit," [22] and again: "The argument for a lapsing of the order so far as it related to the children must in any case be far less strong than that related to the maintenance of the wife." [23] He later referred to "the discharge of any pre-existing personal rights subsisting under a maintenance order . . . in favour of a wife or (perhaps still more) of children." [24]

To sum up: It is still a principle of English law that if an Englishman wishes to divest himself of a wife of whom he has tired, all he needs is the will and the money to bring himself

[16] 29 *British Year Book of International Law* (1952) 286.
[17] 334 U.S. 541 (1948).
[18] 1956, 1 N.Y. 2d., 342.
[19] pp. 842–843.
[20] An order for the maintenance of the children could of course have been obtained under the Guardianship of Infants Acts, 1886–1951.
[21] See *per* Hodson L.J., p. 846. An amendment of the law of the state of New York to close this gap was under consideration in *Vanderbilt* v. *Vanderbilt*. See also (1957) 20 M.L.R. 167.
[22] p. 833.
[23] p. 834.
[24] p. 840.

within the jurisdiction of a sufficiently complaisant court. But at least if he returns to the country in which he abandoned those dependent on him, the Court of Appeal has said that he can no longer refuse as of right the payment of minimal weekly sums for their subsistence.

The rightness of the decision can only have been strengthened by subsequent proceedings [25] in which, not having paid any of the costs and maintenance due after the decision in the divisional court, despite an income of some £4,000 a year, the former husband in *Wood* v. *Wood* unsuccessfully applied to the Court of Appeal for leave to appeal to the House of Lords against its decision, and on the second occasion offered the inadequate sum of £100 towards the costs of such an appeal to his former wife, who had received legal aid in the Court of Appeal. It is surely quite intolerable that a parent in comfortable circumstances should be permitted to withhold the payment of 30s. a week for the maintenance of a legitimate child, while spending time and money in pursuing to the uttermost limit his litigation against the other—indigent—parent, to whose sole custody the child has been abandoned.

O. M. STONE.

BASTARDY AND THE NATIONAL ASSISTANCE BOARD

THE courts continue to explore the interesting borderland between public and private law which is the peculiar province of the National Assistance Act, 1948.

In *National Assistance Board* v. *Tugby* [1] the question was fundamentally the same as that raised in the earlier cases of *Wilkinson*, *Prisk*, *Stropher*, *Parkes* and *Mitchell*,[2] namely, whether the Board's right to obtain a maintenance order against the person primarily liable to support the assisted person was identical with the latter's own right to seek such an order. In the cases of *Wilkinson* and *Prisk* the court acknowledged that the Board enjoyed an independent right of its own but subjected it to the same conditions as applied to the individual's right. In *Stropher* and *Parkes* it was suggested that the independent right of the Board might survive in circumstances where the individual's right was lost. In *Mitchell* and in *Tugby* the Board's right was held to exist even where the individual's right was non-existent.

In *Tugby* the facts were that in July, 1952, a spinster had a child by the respondent, who signed the register of births as the child's father. At that date he was married, but in April, 1953, his marriage was dissolved, and in the following September

[25] On April 8 and June 19: see *The Times*, April 9 and June 20, 1957.

[1] [1957] 2 W.L.R. 316; [1957] 1 All E.R. 509.

[2] *N. A. B.* v. *Wilkinson* [1952] 2 Q.B. 648; *N. A. B.* v. *Prisk* [1954] 1 All E.R. 443; *Stropher* v. *N. A. B.* [1955] 1 Q.B. 486; *N. A. B.* v. *Parkes* [1955] 1 Q.B. 486 (Divisional Court) and [1955] 2 Q.B. 506 (Court of Appeal); *N. A. B.* v. *Mitchell* [1956] 1 Q.B. 53.

he married the child's mother. In March, 1955, the spouses separated by mutual consent, the mother keeping the child but receiving no maintenance. In February, 1956, the Board paid various sums to the mother in respect of the child, and then applied to the justices for a summons to be served on the respondent under section 3 of the Bastardy Laws Amendment Act, 1872, with a view to an affiliation order being made against him.

The Board relied upon section 44 (2) of the National Assistance Act, 1948, which states—

> "If no affiliation order is in force the Board may within three years from the time when assistance was given . . . make application . . . for a summons to be served under section 3 of the Bastardy Laws Amendment Act, 1872."

Section 3 provides—

> "Any single woman who may be with child or who may be delivered of a bastard child may either before the birth or at any time within twelve months from the birth of such child . . . make application for a summons to be served on the man alleged by her to be the father of the child. . . ."

The justices rejected the Board's application on the ground that the mother could not be a single woman *quoad* her own husband (on the authority of *Mooney* v. *Mooney* [3]), and that, as she could not apply herself, neither could the Board. This line of reasoning was not only consonant with cases such as *Wilkinson* (above) but had also been specifically commended in *Mitchell*.

In that case the Board applied in 1954 for summonses under the Act of 1872 against the father of twins whose mother had received assistance for them. At their birth in 1947 the mother was married but living apart from her husband. The father admitted paternity but had never paid anything towards their maintenance. The stipendiary magistrate rejected the Board's application on the grounds that (i) the mother's right to apply was barred as more than twelve months had elapsed since the twins' birth, and therefore the Board could not apply; (ii) the court could not now adjudge the twins to be illegitimate, the mother having declared her husband to be their father at the time of registering their birth; (iii) there was insufficient proof to establish the mother's status as a single woman within the meaning of the Bastardy Acts.

The Divisional Court (Lord Goddard C.J., Ormerod and Glyn-Jones JJ.) disagreed with the first ground when the matter came before them on case stated. They considered that the Board could still apply, even though the mother's right was barred by effluxion of time, provided it did so within the period of three years from the giving of the assistance. But in remitting the case to the learned stipendiary both the Lord Chief Justice and Ormerod J.

[3] [1952] 2 All E.R. 812.

indicated that he would still need to be satisfied that the woman was a single woman before the Board could exercise its right. Glyn-Jones J., on the other hand, considered that the only conditions imposed on the wholly independent right of the Board were those contained in section 44 (2) (above)—that assistance had been given in respect of the child, and that the application was made within three years thereafter.

The logic of this last view found tacit acceptance in *Tugby* where the Divisional Court (Lord Goddard C.J., Cassels and Lynskey JJ.) agreed that the Board might exercise its right, although the mother, not being a single woman, could not; the converse opinions in *Mitchell* were disapproved. The new case is to be welcomed; for it would be illogical to admit the Board's application where the mother's right is barred by effluxion of time, yet to reject it where she cannot apply because of her personal status. Accordingly, the present law may be summarised thus—

A. To apply for a summons under section 3 the mother must show that (1) her child is illegitimate (2) she is a single woman (3) her application is brought (subject to certain exceptions) within twelve months of the birth.

B. To apply under section 44 (2) the Board need only show that (1) it has provided assistance for a bastard child (2) no affiliation order is in force in respect of the child (3) its application is brought within three years of the giving of such assistance.

Both *Mitchell* and *Tugby* leave unexplained the different interpretation by the courts of the Board's corresponding right under section 43 of the Act of 1948, which allows it to apply for a maintenance order against a man who fails in his liability under section 42 to support his *legitimate* family.[4] For it was held in *Wilkinson* that the Board cannot successfully invoke this right where assistance is given to a wife who has forfeited her own right to support through some matrimonial misconduct such as adultery or desertion. At first sight it appears inconsistent that the Board's right under section 43 should be so restricted, whilst its right under section 44 (2) is freed from the limits set upon the individual's right. The explanation is, it is submitted, that the husband's liability to maintain is itself extinguished, or at least suspended, in the *Wilkinson* situation, whereas the putative father's liability to support his bastard remains, even when the mother cannot enforce it because of effluxion of time (as in *Mitchell*) or lack of single status (as in *Tugby*): if the father remains liable, then this liability may be enforced by the Board under the independant right of action which section 44 (2) has conferred upon it. Thus explained, *Mitchell* and *Tugby* are readily distinguishable from *Wilkinson* and fully in accord with *Prisk*, *Parkes* and *Stropher*,

[4] Or illegitimate children in respect of whom an affiliation order has been made against him (s. 42 (2)).

in all of which the husband, having separated from his wife by mutual consent, was held still to be liable to the Board for her support, with the consequence that if she fell in need of national assistance the Board might exercise its right against him under section 43.

The problem whether the husband is also liable to the wife for her support after a consensual separation, on which divergent views had been expressed in *Parkes*, came squarely before the Divisional Court in *Pinnick* v. *Pinnick*.[5] In *Parkes*, although that case was only concerned with the husband's liability to the Board, Denning L.J. (as he then was), disagreeing with the Lord Chief Justice in the court below, put forward the sweeping proposition that the husband was still liable to his wife for her maintenance even after a consensual separation, and that this liability was not affected by the absence in the terms of the separation of any undertaking, express or implied, that he would continue to support her. The relevant cases prior to *Parkes* have already been reviewed by the writer elsewhere.[6] The interest of *Pinnick* is that in its single judgment the Divisional Court (Lord Merriman P. and Collingwood J.) was at pains to follow these earlier cases and to revert to the principle that the wife in the above situation had lost her own right to seek support from her husband under the Summary Jurisdiction Acts. The proposition of Denning L.J. was properly regarded as *obiter* to the decision of the Court of Appeal in *Parkes*, while somewhat similar observations of his Lordship in *Price* v. *Price* [7] were considered, after a careful analysis of that decision, not to have been supported by the other Lords Justices, so that this part of Denning L.J.'s judgment could be regarded as a minority or dissenting judgment. The Divisional Court preferred the contrary conclusion which it had adopted in *Baker* v. *Baker* [8] and followed in *Stringer* v. *Stringer* [9] and *Starkie* v. *Starkie* (*No. 2*).[10] Moreover, it considered itself under a duty to follow what was said by the Court of Appeal in *Chapman* v. *Chapman*.[11] Although this case is not reported, the Divisional Court was able to refer to a copy of the official shorthand note of the judgments, which, in accordance with practice, the Court of Appeal had sent to Lord Merriman P., since a decision in which he was involved was being reversed. These judgments (of Asquith and Birkett L.JJ. with Harman J. concurring) express approval of *Baker* v. *Baker*. Equally, it felt bound by the approval given to that same case by the majority of the Court of Appeal in *Price* v. *Price*.

As the Divisional Court points out, these divergent views can

[5] [1957] 1 W.L.R. 644.
[6] (1956) 19 M.L.R. 630–637.
[7] [1951] P. 413; [1951] 2 All E.R. 580n.
[8] (1949) 66 (Pt. 1) T.L.R. 81.
[9] [1952] P. 171; [1952] 1 All E.R. 373.
[10] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.
[11] Unreported, April 4, 1951.

only be reconciled, if not by the Court of Appeal itself, by the House of Lords, unless they are resolved by the passing into law of Mr. Keegan's Maintenance Agreements Bill which received its third reading in the Commons on May 10, 1957. The Bill would empower the court not only to vary any financial provisions in a separation agreement (in accordance with the principle of *Tulip* v. *Tulip* [12]) but also to insert financial provisions in a separation agreement which does not contain any. Mr. Keegan may succeed where Lord Denning has—so far at least—failed. Success would then place the husband's liability to his wife on the same footing as that to the Board, which, as is expressly reaffirmed in *Pinnick*, may still obtain a maintenance order against the husband whose wife is receiving assistance, notwithstanding a consensual separation in whatever terms.

L. NEVILLE BROWN.

BIRTWHISTLE *v.* VARDILL [1]
PROVINCIALISM ON THE WAY OUT?

EVER since the decisions in *Re Wilson* [2] and *Re Wilby* [3] one has been hoping for some clarification as to the problem of successions governed by English law where adopted children are concerned. A singularly unfortunate solution is enunciated in the recent decision of *Re Marshall*,[4] where the facts were as follows: a testator, who died domiciled in England in June, 1945, left, *inter alia*, his residuary estate by a will made two months earlier (when, presumably, he was also domiciled in England) on trust for his wife for life with remainder to certain cousins, whom he named, as might survive his wife. The will contained a substitutionary clause reading: "Provided always that should any of [these] cousins be then dead (*sc*: at the date of his wife's death) leaving issue then living such issue shall take the share which his her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares."

Among these named cousins was one C.S.J., who had married, and emigrated with his wife to Canada, becoming domiciled in the province of British Columbia in 1912. In 1913, having no children of their own, they entered into an arrangement whereby the Children's Aid Society of Vancouver entrusted a baby girl, G, born in that province and presumably domiciled there, to their care. They were to receive G into their home, and act towards her at all times with kindness and consideration and provide her

12 [1951] P. 378; [1951] 2 All E.R. 91.
1 (1840) 7 Cl. & F. 895: see the writer's note, "*Birtwhistle* v. *Vardill* Provincialism Again?" in (1956) 19 M.L.R. 432, on *Re Wilby* [1956] P. 174; [1956] 1 All E.R. 27.
2 [1954] Ch. 733; [1954] 1 All E.R. 997; 3 I.C.L.Q. 492.
3 *Supra*.
4 [1957] 1 All E.R. 549.

with food, clothing, etc., treat her as a member of the family, and educate her. The arrangement was to last as long as both parties were satisfied with it, and the child could be visited by duly authorised persons; and, if found necessary, she could be returned to the Society's care on certain conditions. In fact, however, G had always been treated as a daughter and ever since 1913 had lived as a member of the family of C.S.J. One might call her, indeed, a *de facto* adopted daughter of C.S.J. and his wife.

In March, 1945, *i.e.*, about a month before the testator made his will, C.S.J. and his wife jointly adopted a ten year old boy, A (born and also, presumably, domiciled in British Columbia), who was under the legal guardianship of the same Society. The adoption of A, however, was effected by an order of the Supreme Court of British Columbia, there then being adoption legislation in force [5] in that province.

The question now confronting Harman J. is—C.S.J. having died in 1950 and the testator's wife in 1955—whether G and A were "issue" of C.S.J. for the purposes of the will.

The learned judge, in a reserved judgment, dismissed G's claim without much difficulty. But he did take the trouble to examine [6] the nature of the agreement between the Society and C.S.J. and his wife, saying:—

> "The document . . . is not . . . a true adoption at all. It is a mere putting out of the child as a foster child and can be terminated by the adopting party at any time on two weeks' notice. Such an agreement cannot possibly give the object of it rights of inheritance under general words in an English will." [7]

Turning to A's claim, the learned judge said that he considered the relevant date on which he must determine whether A fell within the class of persons capable of taking was not the date of the widow's death in 1955 but rather that of the testator in 1945.[8] Assuming, said the judge, that A and his adoptive parents had been domiciled in England and an adoption order obtained from an English court in March, 1945, A could not have been recognised in England "as issue of C.S.J. for the purposes of inheritance" [9] because of the express provisions of the Adoption

[5] The first legislation was the Adoption Act, 1920. The legislation under which A was adopted was Revised Statutes of British Columbia, 1936, c. 6. It is strange that C.S.J. and his wife never took steps legally to adopt G.

[6] *Cf.* the approach of Vaisey J. in *Re Wilson* [1954] Ch. 733, at p. 741; also that of Barnard J. in *Re Wilby* [1956] 1 All E.R. 27, at p. 30, criticised by the present writer in (1956) 19 M.L.R. 432, at pp. 434–435.

[7] [1957] 1 All E.R. 549, at p. 552.

[8] *Ibid.*, at p. 553.

[9] *Ibid.*, at p. 552.

of Children Act, 1926, s. 5 (2),[10] which was then in force. The judge then proceeded to demonstrate that the same situation would have resulted had the facts been transposed to British Columbia, *viz.*, the testator had died domiciled there and was disposing of property situated there. He examined the local statute law [11] in force in 1945 and found that—

> " rights of inheritance and succession are given only as between each other to persons adopted and their adopters. Further, the status of an adopted person is only equated to that of a natural born child so far as regards the legal descendants of his adoptive parent." [12]

Accordingly, A's claim was dismissed. Nevertheless, one is glad to see that the learned judge was not afraid to compare the adoption legislation of the *lex causae* [13] with that of the law governing the adoption, for he says:

> " [Barnard J.] was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but is a task often faced. It is in English courts a question of fact to be ascertained on proper evidence of skilled persons." [14]

Although it was not necessary to the decision, Harman J. proceeded to deal with the position—at some length [15]—on the footing that the relevant date for deciding whether A was entitled was 1955. He examined the relevant English and British Columbian laws then in force. As to English law, section 13 (2) of the Adoption Act, 1950,[16] provided that, in the instant circumstances, A would be included among the children of C.S.J., so that, had there been an English adoption order, A could have succeeded. But, had there been no such order, he could not.[17] Further, he said, if English law alone were applicable here, it would follow from *Re Wilby* [18] that A could not succeed because section 13 (4)

[10] That subsection provided that an adoption order should not confer on the adopted child any right under or interest in property as a child of the adopter and that the expression " issue " where used in any disposition whether made before or after the making of an adoption order should not, unless a contrary intention appeared, include an adopted child.

[11] Revised Statutes of British Columbia, 1936, c. 6, ss. 9 (*c*), 10 (1) and 12.

[12] [1957] 1 All E.R., at p. 553.

[13] English law as the *lex successionis*.
English law was the *lex successionis* in both *Re Wilson* and *Re Wilby* (both *supra*).

[14] [1957] 1 All E.R., at p. 556. Such a comparative approach was urged by the writer in (1956) 19 M.L.R. 432, at p. 435.

[15] *Ibid.*, pp. 553–555.

[16] " In any disposition of real or personal property made . . . by will . . . after the date of an adoption order . . . any reference to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person." It will be noted that the word " issue " is omitted from this subsection, whereas it is included in s. 5 (2) of the 1926 Act. This does not seem to have affected Harman J.'s reasoning.

[17] [1957] 1 All E.R., at p. 554.

[18] *Supra.*

of the 1950 Act stood in his way.[19] He then pointed out that the position here was different from that obtaining in *Re Wilson*,[20] for here C.S.J., his wife and A were all domiciled in British Columbia at the time the adoption was made. As to the British Columbian adoption laws, they were amended[21] in 1953 so as to make an adopted person stand in regard to the kindred of his parent by adoption in the same position as though he had been born in lawful wedlock. Thus, if an English court were to apply this legislation in 1955, A would be entitled to succeed.

Since this was an English will, it must, said Harman J., be construed by English law. This might mean that no other law need be looked at, so that, taking *Re Donald*[22] as a point of departure, "issue" by English law means issue of the body and so, as a matter of construction, could not include adopted children. However, his Lordship was not prepared to adhere to this view. In his opinion he was bound by the English decision of *Re Luck*[23] in which it was held that the *White-Grove* rule[24] was not limited to cases of *legitimatio per subsequens matrimonium* but applied also to what Greene M.R. and Luxmoore L.J. called "legitimation by adoption."[25] While this analogy must be drawn with caution, and while English law as the *lex successionis* ruled that, as a matter of construction, a reference to the children of a particular person meant his legitimate children, it was, as a matter of status, his domiciliary law which would indicate who are his legitimate children.[26] Although this meant going against Barnard J. in *Re*

[19] *Ibid.* The subsection reads: "The references in this section to an adoption order include references to an order authorising an adoption made after the commencement of this Act under the Adoption of Children Act (Northern Ireland), 1929. . . ." Thus *the whole section* is restricted to Northern Irish and English adoption orders according to Barnard J. in *Re Wilby* [1956] P. 174.

[20] At p. 180, *supra*. The adopters were domiciled in England and their adoption of a child domiciled in Quebec was effected in Quebec. The case thus left open the situation arising in *Re Marshall*.

[21] By the Adoption Act Amendment Act, 1953, s. 2, which amended the revised legislation of 1948. See s. 13 (2) (*c*) of the English Act.

[22] [1929] 2 D.L.R. 244, at p. 247, *per* Smith J. It was held that a child, validly adopted under the law of Washington, could not take under a gift to children under the will of a Saskatchewan domiciled testator, even though, by Washington law, the child could have taken.

[23] [1940] Ch. 864, esp. at pp. 881–882, *per* Greene M.R. and Luxmoore L.J.

[24] *Re Wright* (1856) 2 K. & J. 595; *Re Grove* (1888) 40 Ch.D. 216—that *legitimatio per subsequens matrimonium* will not be valid in the eyes of English law unless it is allowed both by the law of the father's domicile at the date of the child's birth and that at the date of the subsequent marriage.

[25] [1940] Ch., at p. 875. Strictly, as Mann has indicated in (1941) 57 L.Q.R., at p. 119, it was not adoption but legitimation by recognition. However that may be, Harman J. said "adoption . . . is a kind of legitimation" ([1957] 1 All E.R., at p. 556). In accord is Cheshire, *Private International Law*, 5th ed., p. 410: "Adoption, since it creates the relationship of parent and child between the parties, is justifiably regarded as a form of legitimation. . . ."

[26] [1957] 1 All E.R., at p. 555, following a statement of Kay J. in *Re Andros* (1883) 24 Ch.D. 637, at p. 639 and approved of in *Re Luck* and *Re Grove* and *Re Wright* (all *supra*). (*Cf.* Smith J. in *Re Donald* (*supra*): "It is not a question of status, but a question of whether this adopted child is a person such as mentioned and described in this bequest.")

Wilby [27] Harman J. was confident in holding that, were 1955 the correct date, A would have succeeded as he and his adoptive parent were both domiciled in British Columbia when A was adopted. He thought *Re Luck*,[28] which had not been cited in *Re Wilby*,[29] was sufficient warrant for so holding.

On the credit side, the case establishes that it was a question of status and not of construction whether A could succeed. It indicates a willingness on the judge's part to see whether the English law of adoption was substantially similar to that of British Columbia. It also seems to indicate both that section 13 (2) is not confined to English adoptions and that section 13 (4) should not cause trouble in future cases of this sort.

On the debit side, we are now to say that the adopter's domicile at the birth of the adoptee must give a capacity to the adoptee of being placed in a child-parent relationship with the adopter, and that the adopter's domicile at the date of the adoption, which gives the status, must be a domicile in a country which attributes to adoption that effect.[30] Just how right was Scott L.J. when he said in *Re Luck* that "the decisions about legitimation *per subsequens matrimonium* . . . postulate the possession by the natural father of the same domicile at the date of birth as at the date of marriage" [31] is borne out by the following problem on adoption—

> B, a ten-year-old boy domiciled in British Columbia, is there validly adopted by H and W, who are also domiciled there. Ten years ago, H and W were domiciled in, say, Burma, whose laws do not allow non-Christians to adopt children.[32] *Semble*, B could not take as a "child of H and W" under an English will.

Further, if the rule enunciated by Harman J. is correct, one wonders why he did not say that G could not succeed because, at the date of her birth, British Columbian law did not confer capacity on her of being placed in a child-parent relationship with C.S.J.

If the *White-Grove* rule is extended into the sphere of adoption proper, the relevant dates are the child's birth and the date of the adoption. What dates the judge considered in fact are not easy to discover. When dealing with A's claim on the 1945 basis, he refers to the actual date of the adoption order, *viz.*, March, 1945, but says nothing about the date of A's birth and the law then in force unless one counts as being material his statement that—

27 *Supra.*
28 *Supra.*
29 *Supra.*
30 The language here is suggested by Cotton L.J. in *Re Grove* (*supra*) at p. 233.
31 [1940] Ch. 864, at p. 888, in the course of his dissenting judgment.
32 See Derrett in (1957) 20 M.L.R. p. 65.

> " adoption in that province goes back to 1920, and the Act in force when the adoption order of 1945 was made was that which appears in the Revised Statutes for 1936 which consolidated the law up to that date." [33]

And when he deals with A's claim on the 1955 basis, he has assumed that it is immaterial that, in 1934, rights of inheritance and succession were given only as between A and C.S.J. and that A would have been regarded as C.S.J.'s natural born child so far as regards C.S.J.'s legal descendants. Apparently, so long as the *lex domicilii* of the adopter confers a capacity to be adopted on the adoptee at birth, it will not matter that the incidents of adoption at that time differ from those at the time the question for decision arises. There need not, then, be a substantial similarity of incidents as at the two dates.

It is, however, a matter for regret that *Re Luck* [34] has been extended into the realms of adoption proper. In that case and in the legitimation cases, the children were, as from the moment of their birth, the *de facto* children of their fathers, potentially, if one must say it, capable of being legitimated at a later date. But here neither G nor A were the blood children of C.S.J. and his wife. What relevance C.S.J.'s domicile can have at the date of G's and A's birth it is difficult to see, though one might have been more willing to sympathise with this extension of the rule had G and A in fact been C.S.J.'s illegitimate children. One cannot help wishing that the learned judge had adopted paragraph 143 of the *Restatement on Conflict of Laws*, which reads—

> " The status of adoption, created by the law of a State having jurisdiction to create it, will be given the same effect in another State as is given by the latter State to the status of adoption when created by its own law."

By so doing, he would have arrived at the same result and at the same time avoided the unfortunate extension of *Re Luck*.[35]

P. R. H. Webb.

Innocent Misrepresentation or Term of the Contract?

In *Oscar Chess* v. *Williams* [1] the defendant orally sold to the plaintiffs a car thought by both to be a 1948 Morris 10 Saloon, and indeed it was so described in the registration book. The plaintiffs based the price they offered on the current price for such a car in *Glass's Guide*. After the sale the registration book was found to be a forgery and the true date of manufacture of the car ascertained to be 1939,

[33] [1957] 1 All E.R., at p. 553.
[34] *Supra.*
[35] *Supra.*
[1] [1957] 1 W.L.R. 370; [1957] 1 All E.R. 325.

whereupon the plaintiffs demanded as damages the difference between the actual value of the car and the contract value.[2]

Denning L.J. pointed out that first it must be seen if the representation made by the defendant as to the age of the car was a term in the contract. Here he suggested that the judge of first instance, who had immediately proceeded to classify the term as a condition or a warranty, was misled by the confusion in the English language due to " warranty " having two meanings, the first a binding promise and the second a particular kind of promise in a contract as contrasted with a condition.[3] The majority of the court, Denning and Hodson L.JJ., concluded that the representation was not a term in the contract, " both parties assumed that the Morris was a 1948 model, and this assumption was fundamental to the contract. But this does not prove that the representation was a term of the contract."[4] All the seller said, they thought, was " I believe it is a 1948 Morris. Here is the registration book to prove it." However, Morris L.J. in his dissenting judgment, found that the representation was not merely an integral term of the contract but a fundamental one, for the defendant would not have sold if he could only realise the value of a 1939 car and the plaintiffs based the price they would pay on the current value of a 1948 Morris in *Glass's Guide*. " . . . it was not only a term but an essential term," he said and " the statement was adopted as the foundation of the contract that they made."[5] The car was even described in the invoice as a 1948 Morris. The situation was very similar to *Bannerman* v. *White*.[6] The majority relied on *Routledge* v. *McKay*[7] to support their decision. In this case a motor-cycle was sold on the innocent representation that it was manufactured in 1942, as stated in the log book, whereas it was of much earlier vintage. It was decided that there was nothing to show that the representation was intended as a term in the contract. Morris L.J. distinguished it as the contract was in writing and the writing " represents prima facie the record of what the parties intended to agree when the actual transaction took place,"[8] and therefore the representation was not a term. In the present case the contract was oral and no such considerations need be applied. It is difficult to contradict Morris L.J.'s argument, for once a term is of fundamental importance to the contract it is most likely to be a term in the contract even if not reiterated at the time of the actual

2 Denning L.J. said that the two parties had made a fundamental mistake which would entitle the plaintiffs to relief in equity, namely rescission. (*Solle* v. *Butcher* [1950] 1 K.B. 671.) But he was too late. (*Leaf* v. *International Galleries* [1950] 2 K.B. 86.) It is interesting to note that no mention was made of time in *Solle* v. *Butcher* where the lease was in force for two years.

3 Denning L.J. [1957] 1 W.L.R. 370, 374.

4 Denning L.J. *ibid.*, 375.

5 *Per* Hodson L.J. *ibid.*, 380.

6 (1861) 10 C.B.(N.S.) 843.

7 [1954] 1 W.L.R. 615.

8 *Routledge* v. *McKay*, Evershed M.R., *ibid.*, 621.

sale, for its importance may be so self-evident that restatement is not required.

It is surprising that section 13 of the Sale of Goods Act, 1893, which implies a term in a sale of goods by description that the goods shall correspond to the description, was not mentioned. There is no difficulty in finding that a sale of specific goods is by description. " . . . there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description." [9]

Having decided the representation was not a term in the contract, the majority, heeding Lord Moulton's warning [10] as emphasised by Evershed M.R. in *Routledge* v. *McKay* that damages must not be given for innocent misrepresentation, find that it was not even a warranty collateral to the contract for such a warranty must be contractual in form. " It is something which a man must be taken to bind himself " [11] and they thought that the defendant merely stated an opinion and made no promise.

One cannot help feeling that, consciously or unconsciously, the majority were strongly influenced by the fact that the plaintiffs were motor dealers and the defendant an uninstructed layman. This, indeed, is hinted at in the final paragraph of the judgment of Denning L.J.,[12] which echoes some rather similar observations of his in *Pearson* v. *Rose & Young*.[13] The danger of this approach is that the decision is liable to be treated as a binding authority where the roles are reversed. Prior to the *Chess* case it seems unthinkable that any court would have had any doubt that a representation by a dealer, that a car which he was selling was of a particular vintage, was a condition of the contract. But now, faced with this decision, judges may feel constrained to hold the contrary.[14]

Olga Daly.

Factories Act, s. 14: Combined Machine-Material Danger

Section 14 of the Factories Act, 1937, requires dangerous parts of any machinery to be securely fenced, but not materials or articles which are not part of a machine but " which are dangerous while in motion in the machine." Thus, the statutory duty to fence has been

[9] *Grant* v. *Australian Knitting Mills* [1936] A.C. 85, *per* Wright L.J., 100.
[10] *Heilbut Symonds* v. *Buckleton* [1913] A.C. 30.
[11] *Oscar Chess* v. *Williams* [1957] 1 W.L.R. 370, at 375.
[12] [1957] 1 W.L.R., at p. 377. " It seems clear to me that the motor dealers who bought the car relied on the year stated in the log book. If they had wished to make sure of it, they could have checked it then and there. . . . They are experts. . . ."
[13] [1951] 1 K.B. 275. " . . . in this case the buyer . . . was himself a motor dealer who bought the car . . . for £450 . . . and sold it . . . for £620. A dealer whose business enables him to make quick and large profits of that kind must not be surprised if he occasionally gets his fingers burnt."
[14] Just as the strange decision in *Pearson* v. *Rose & Young*, *supra*, may cause non-dealers to burn their fingers.

held not to apply to a case where wood being worked in a machine was thrown out injuring the operator: *Nicholls* v. *Austin*.[1]

Lenthall v. *Grimson* (1956, unreported), *Hoare* v. *Grazebrook*[2] and *Lewis* v. *High Duty Alloys*[3] involved a rather different situation from that in *Nicholls*' case. In all three the workman was injured by a danger arising through the conjunction of part of the machine with some part of the material being worked in it. In *Lenthall* and *Lewis*, it was the "nip" between the metal die and the "bridge" shaver of the machine under which the die passed to and fro as it was being shaved. In *Hoare*, it was the "nip" between the descending borer and the aperture it was making in the axle-box clamped to the machine.

Finnemore J. in *Lenthall* and Lynskey J. in *Hoare* held that a "nip" of this kind is a danger in the machine itself and not just from the workpiece with which the machine is dealing at the time. In *Lewis*, on the other hand, Ashworth J. took the narrower view of section 14, equating the "nip" danger with a danger due to the ejection of material as in *Nicholls*. Given this equivocality in the scope of the statute and this conflict of interpretation in the High Court, one is naturally inclined to opt for the overall purpose of the particular legislation, that is to say, to favour the view that assists the injured man. But it is impossible, at the present time, to predict with any confidence that the higher courts would do this.

The decision in *Lewis* did, however, illustrate the importance of the supplementary function of the common law in industrial injury cases. For, whether a "nip" is in or out of the Act, it does constitute a reasonably foreseeable risk that activates the common law duty of care, and, on this ground, Ashworth J. was able to award damages.

C. GRUNFELD.

THE RATIO DECIDENDI OF A CASE

IN his recent article [1] Professor Montrose contrasts two views as to the correct definition of the *ratio decidendi* of a case. One, which may conveniently be called the classical theory, may be summed up by the proposition that the ratio is "the principle of law which the judge considered necessary to the decision."[2] The other, which was advanced by Professor Goodhart some years ago,[3] will be called the Goodhart theory, and is said by Professor Montrose to be accurately summed up by the proposition that "the *ratio decidendi*

[1] [1946] A.C. 493.
[2] [1957] 1 W.L.R. 638.
[3] [1957] 1 W.L.R. 632.
[1] In (1957) 20 M.L.R., at p. 124.
[2] This is substantially Paton's exposition. See *Jurisprudence* (1st ed.), p. 159, cited by Montrose.
[3] In 40 *Yale Law Journal* (1930), and reprinted in *Essays in Jurisprudence and the Common Law*, p. 1.

of a case can be defined as the material facts of the case plus the decision thereon."[4] Both theories agree that the *ratio decidendi*, once determined, is binding or authoritative, and that it may be determined in a single case taken by itself. Now it is hardly possible to contrast the two theories except in relation to a case where the judge does explicitly state a principle[5] of law, and in this note it will be assumed that the discussion is limited to such a case. In such circumstances it is submitted that the Goodhart theory is indistinguishable from the classical theory.

It must be noted first of all that Goodhart insists that the judge's own statement of the material facts of the case must be accepted, if he makes one; even if his statement is demonstrably wrong one ought not to go behind his findings upon this point. In the second place it must be remembered that a rule of law will always be found to contain two parts; the first specifies a number of facts and the second specifies the legal result or conclusion which ought to follow whenever these facts are found to co-exist. This analysis of the form of legal rules is now too well known and established to require elaboration.

When, therefore, a judge states a rule of law, and treats it as applicable to the case before him, the applicability must depend upon his finding that the *material* facts of that case correspond precisely to the facts specified in that rule, and, this being so, that the conclusion or result specified in that rule ought to follow. The rule stated by the judge ought, therefore, upon the basis of Professor Goodhart's arguments, to be treated as the *ratio decidendi*, since it both contains the court's conclusion and the court's findings as to the material facts of the case. The classical theory and the Goodhart theory, if logically followed out, produce the same result.

It is not so obvious that the same is true if the judge states a rule of law, says that it governs his decision, and then proceeds to show that it does not apply to the facts of the case in question. Suppose that a judge says that an action for negligence can only succeed if the damage which the plaintiff alleges is physical damage to his person or property, and then proceeds to show that upon the facts of the case before him the plaintiff has alleged and proved damage of a different kind, so that he feels bound to give judgment for the defendant. Here the rule stated by the judge specifies facts which are not present in the facts of the case before him. In such a case the judge does however by implication treat the "non-physical" nature of the damage (which is a fact present in the case) as material, and it is by stating the rule and holding it to be inapplicable that he makes his opinion upon this point known. He could equally well have said "The rule of law applicable here is

[4] This is Glanville Williams' summary, *Learning the Law* (3rd ed.), p. 57, cited with approval by Montrose.

[5] No distinction is made in this note between a rule of law, a principle of law or a proposition of law. Although there is certainly a distinction made in common usage, it seems to be too vague to be of much significance.

that in an action for negligence where non-physical damage only is proved the plaintiff ought not to recover." Thus, even in this sort of case it is to the rule of law stated by the judge that we ought to turn to discover the *ratio decidendi*, for again the two theories lead to the same result.

It seems therefore that Professor Goodhart, having said that the proposition of law propounded by the judge may be ignored in determining the *ratio decidendi*, and having advanced weighty arguments tending to show that such propositions make unsatisfactory *rationes decidendi*, fails to see that his own arguments make it obligatory that such a proposition should not be ignored. His own theory is just as much open to the same criticism as he and others have directed against the classical theory [6]—criticism to which there has been as yet no satisfactory reply.

A. W. B. SIMPSON.

MATRIMONIAL CAUSES RULES, 1957

The most potentially important of the new rules now appearing in the Matrimonial Causes Rules, 1957,[1] is rule 56, which provides that in any proceedings to which the Rules apply, if the court considers that any children ought to be separately represented, the court may assign a guardian *ad litem* to them and authorise him to intervene on their behalf.[2] Unfortunately, however, it appears from the wording of the rule that such an order may only be made " on the application of the Official Solicitor or some other proper person." Surely, if this wording is strictly construed, the effect must be to defeat the very object of the proposed amendment, which is to protect the interests of children whose parents and relatives are too occupied with their grievances against each other to take account of the effect on children of the arrangements they seek in their own interests. Would the new rule have effectively protected the financial interests of the children involved in such recent cases as *Sievwright* v. *Sievwright* [3] and *Sugden* v. *Sugden*?[4] The crucial question will be how far the courts are prepared to take the initiative and require separate representation of children involved in matrimonial proceedings, whenever their interests appear to need watching.

A new rule 55 provides that, immediately on the filing of the petition in a matrimonial cause, and even before the service, an

[6] *e.g.*, Goodhart, *op. cit.*; J. Stone, *Province and Function of Law*, pp. 186 *et seq.*; F. S. Cohen, *Ethical Systems and Legal Ideals*, pp. 34 *et seq.*

[1] S.I. No. 619 (L. 4), incorporating the Matrimonial Causes (Amendment) Rules, 1957, S.I. No. 176 (L. 2).

[2] This brings into partial effect the recommendation of the Royal Commission on Marriage and Divorce, Cmd. 9678, para. 927, p. 243, which made no recommendation that application must be made before the court might order separate representation.

[3] [1956] 1 W.L.R. 1452, and see (1957) 20 M.L.R. 169.

[4] [1957] P. 120, and see (1957) 20 M.L.R. 170.

injunction may be applied for, restraining the respondent or anyone else from removing the children from the jurisdiction of the courts. The rule is again narrower than the Royal Commission on Marriage and Divorce recommended [5] in that provision is only made for application by the petitioner, whereas the Royal Commission recommended the possibility of application by either spouse, a guardian, or any other person who has, or wishes to obtain, the custody or control of the child. It is precisely this tendency to place the onus for the welfare of children on a parent who may well be too occupied with his or her personal grievances to provide adequately for the welfare of the children involved that is so deplorable a feature of the present law.

Other amendments ensure that any petitioner or respondent claiming financial relief must do so on the petition or answer [6] and applications for custody of children must be accompanied by particulars of the arrangements for their support, care and upbringing,[7] so that the court should at least be satisfied on these matters before granting custody, although it has not yet received the power, recommended by the Royal Commission,[8] to refuse decree absolute until so satisfied.

The amendment [9] by which a petition may be filed without disclosing the petitioner's address is also in accordance with a recommendation of the Royal Commission.[10]

Following the decision in *Galloway* v. *Galloway*,[11] the wording of the rules [12] in respect of the children of whom the courts may award custody has now been brought into line with that of section 26 of the Matrimonial Causes Act, 1950, and the strange departure by which the words of the Act, "children, the marriage of whose parents is the subject of the petition," was translated in the rules into "children of the marriage" is ended after a lapse of seven years. The widening of the power to enable the court to make orders in respect of all children (apart from boarded-out children) living in family with the parties at the time of the petition,[13] awaits further legislation, and it can only be hoped that the consolidation of the rules in their present form is not an indication that amending legislation is likely to be delayed.

By the Matrimonial Causes (Decree Absolute) General Order, 1957, the lapse of time between decrees nisi and absolute is, also in accordance with the recommendations of the Royal Commission [14] extended from six weeks to three months, in respect of petitions

[5] Cmd. 9678, para. 423, p. 118.
[6] See amendments to rule 3 (3) and (4).
[7] Rules 4 (3), 17 (8) and 33 (*a*).
[8] Cmd. 9678, para. 373 (ii).
[9] Rule 4 (1) (*d*), as to which see also Practice Direction [1957] 1 W.L.R. 557.
[10] Cmd. 9678, para. 943, p. 248.
[11] [1956] A.C. 299.
[12] See rules 2 (2) (*d*), 4 (1) (*c*), 33, 43 (1), 54 (1) (*c*) and 57.
[13] Cmd. 9678, para. 575, p. 155.
[14] *Ibid.*, para. 958, p. 252.

filed after April 30. Here again, the real interest of the amendment lies in the future, when it may be seen how much more thorough will be the inquiries undertaken by the Queen's Proctor in this extended time. Imagination boggles at the possible effects of really effective probing into the comprehensiveness of the pleadings laid before the courts in matrimonial causes.

O. M. Stone.

REVIEWS

MR. JUSTICE. Edited by ALLISON DUNHAM and PHILIPS B. KURLAND. [Chicago at the University Press (English agents Cambridge University Press). xi and 241 pp. (with index). 28s. net.]

THE editors of this volume, for which we are indebted to the Chicago University Law School, explain in their Preface that their object in preparing it was to bring home to American lawyers that the justices of the Supreme Court have been men of human personality and not mere automatic interpreters of the Constitution and that it is these personalities which have counted in the development of the law, or to use the words of Mr. Justice Frankfurter which they quote, "to rescue the Court from the limbo of impersonality." To this end they persuaded a number of eminent authorities to lecture to their Law School upon nine of the justices and these lectures are reproduced in this book. They are in part biographical and in part estimates of juristic contributions to the work of the court. As is often the case on an occasion of this kind they differ a good deal in method of approach, and also I think in value.

It is perhaps surprising after the events of the last twenty or thirty years that any American citizen let alone any American lawyer should need to have his Supreme Court personalised. I should have thought that every American citizen of mature age has a pretty colourful idea of Holmes, and only less so of Brandeis, Sutherland, Hughes and Stone, all of whom are portrayed. There are only three historic figures among the nine and two of these, Marshall and Taney, are well known as personalities, particularly the latter; for his interventions in the polemics between North and South before and at the time of the Civil War are well known even to elementary students of that period.

Actually, however, these essays seem to me to be most valuable for the light they throw upon the work done by the Supreme Court; particularly in relation to constitutional developments and the backward and forward sway of conceptions of state and federal authority and of individual rights. But here the editors do not seem to have worked to any plan, or if they have it is not very apparent to an English lawyer. Indeed an English lawyer who does not come to the subject with a fair amount of knowledge will find the volume unrewarding, for much of the discussion assumes such a grounding.

Moreover since to trace the influence of these justices on the constitutional development of the U.S.A. was not the main objective of the editors, no attempt has been made to cover the ground in an orderly historical way. Thus the essays are not presented chronologically or in accordance with any discoverable plan. They commence with Holmes, then go back to Marshall, then come right forward to Stone, and finally after dodging backwards and forwards historically finish up with Rutledge and Taney. The truth of the matter seems to be that since the series originated in a course of lectures the subject-matter was fitted to the availability of the lecturers who seem to have been chosen on the basis either that they had written or were writing biographies of the justices whom they discuss (Marshall, Bradley, Sutherland, Brandeis, Hughes and Taney—Bradley and perhaps Sutherland would hardly have appeared in this volume on any other basis) or else had been their law clerks (Holmes, Stone and Rutledge) and could therefore speak of them from personal knowledge. This method of building up a course of lectures is perhaps defensible on practical grounds, but it is unlikely to lead to a book

of any great value. Moreover even on the technical ground of pure biography no systematic policy in regard to such essential matters as social origin, education, career at the Bar, and in politics has been followed.

Parenthetically may I suggest that the development of common law and equity in the U.S.A. is just as important as the development of constitutional law and that judicial personalities are equally involved in this process—English lawyers would appreciate a volume of essays on the contributions made in this field by such judges as Kent, Story, Shaw, Cardozo and Learned Hand, to mention only a few of those whose work has impressed us.

Turning to the individual lectures we find, as we should expect, that Mr. Biddle discourses charmingly if not profoundly about Holmes, of whom little can be said in seventeen pages which is not already well known to all American and many English lawyers. Professor Crosskey's rather long treatment of Marshall is almost entirely taken up with his thesis that the great Chief Justice so far from having dominated his court for thirty years, expounding and developing the Constitution on the basis of the political faith of the Federalists, was in reality, at any rate for the last twenty years of his term of office, the captive of a Jeffersonian majority of the court whose views he was prepared to accept and enunciate for the purpose of maintaining unity. This view will certainly be novel to most English lawyers, but the lecture will not give them much idea of the Chief Justice's contribution to American jurisprudence. The very Victorian figure of Bradley makes a somewhat dim appeal compared with Taney, the impetuous protagonist of State rights and the cause of the South, though, as Professor Fairman points out, his work on the commerce clause came at a crucial period in the commercial and industrial development of the U.S.A. Nevertheless, one cannot help wondering whether it would not have been better to substitute, or at any rate to add, a lecture on Story for the purpose of filling out the nineteenth century.

All the other justices discussed are within the recollection of the present generation. The delightful personality of Stone is well presented by Professor Dunham, who almost persuades us that his movement from the left wing of the court to its right was not due to the growing conservatism of age, and the hardly less attractive figure of Brandeis by Professor Paul Freund. Hughes, who undoubtedly merits one of the longest essays in the volume, emerges as a great man and a great chief justice, a four square personality who managed, if he did not dominate, a very difficult court with superb ability during an exceptionally difficult period. Professor Paschal, whose admirable life of Sutherland I reviewed in these pages when it appeared (16 M.L.R. 106) contributes a model précis of his full-length biography.

As to Rutledge, his title to a place in this course is hardly made out by Mr. Stevens despite his loyal admiration for his old master. The justice no doubt had courage and industry, but the painstaking and detailed scrutiny of the cases in which he took part, to which we are treated in this volume, most of which will be unfamiliar to all but a handful of English lawyers, does little to persuade us of exceptional juristic ability.

C.

The Creative Role of the Supreme Court of the United States. By M. Ramaswamy. [Stanford University Press. London: Oxford University Press. 1957. xiv and 134 and (index) 4 pp. 24s. net.]

Many books have been written on the United States Constitution, but this is a little unusual in that the author is a Senior Advocate of the Supreme Court of India. He has in fact written several works in the field of Indian and United States constitutional law, and the present volume consists of three

lectures delivered at Stanford University in November, 1955—or rather the prepared scripts of the lectures, for Mr. Ramaswamy tells us that in their delivery he merely extemporised upon some parts of the subjects which particularly interested him—together with an Epilogue dealing with the discussions that followed. The author considers that the Supreme Court of the United States maintains the balance of the delicate American constitutional machine, and the lectures are devoted to a study of the working of the court throughout its history in connection with constitutional law, the federal system and civil liberties.

Mr. Ramaswamy knows his subject thoroughly, and though full of admiration for the United States Constitution he is by no means uncritical; but his tribute to Chief Justice Marshall, who set the precedent of wide interpretation of the Constitution, is unstinting. In the first lecture he traces the history of the development of the court from this era through the great constitutional cases, while pointing out some of the less happy decisions, such as in the Dred Scott case (*Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857)). The people's confidence in the court and in its judicial independence is peculiarly uniform, as was seen at the time of Roosevelt's reform proposal, which was felt by so many to strike at its impartiality. The author concludes that the court "has carried forward the work of the Philadelphia Convention by continually adapting the Constitution to new needs and circumstances through its characteristic function of expounding and interpreting the provisions of the fundamental charter. It is because the court has stood by the idea that the Constitution is a vehicle of life which must reflect the spirit and subserve the needs of the age in which it functions—an idea which the distinguished Chief Justice Marshall originated and expounded—that a charter drawn up in 1787 is still operating in full vigor. Otherwise the Constitution would have gone to the limbo of oblivion" (p. 17). The second lecture is concerned with the work of the court on the limits of intergovernmental immunity from taxation and the impact of the all-important Commerce Clause upon the exercise of national and state power in the region of commerce. These are both examples of the court's function as umpire between the federal and state governments, but despite the theoretical progress made by the court in this sphere the author is not entirely happy. ". . . Congress in the present day, preoccupied as it is with a multitude of important questions, simply has not the time to deal with the problem of freeing interstate commerce from a multitude of individually petty and diverse local regulations which in their totality may well suffocate interstate commerce" (p. 68); and no less an authority than the late Mr. Justice Jackson (to whose memory this book is dedicated) held a similar view.

The third lecture perhaps provides the most interesting part of the book for the non-American reader, for it deals with the problem of reconciling majority rule with minority rights. The two-pronged American solution consists of free elections at regular intervals and specific limitations upon the powers of government enforceable by the courts. These latter safeguards are provided partly in the original Constitution, partly by the first ten Amendments, which are known collectively as the American Bill of Rights, applicable only to the federal government, and partly by the Fourteenth Amendment of 1868, which provides *inter alia* that no state shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The author deals specifically with the cases concerning freedom of speech and the press (and he would favour a more stringent rule against the power of the press to discuss and comment on pending criminal trials—one may well be surprised how far this freedom has sometimes been carried in the United States), freedom of religion and finally the Fourteenth Amendment. In interpreting that elusive phrase "due process of law" he agrees with the majority decision in *Adamson* v. *California,* 332 U.S. 46 (1947), that it does not incorporate all the provisions of the Bill of Rights, nor is it confined to these limits.

It is a pity that the facts of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheaton) 316 (1819), are described fully twice (pp. 14–18 and 34–36); and what might have been footnotes have become notes, listed together at the end of the text, a much more common practice among American authors and publishers than in this country. But the book is well written, attractively produced and stimulating in content.

D. C. M. Yardley.

Federalism and Constitutional Change. By William S. Livingston, Associate Professor of Government in the University of Texas. [Oxford: Clarendon Press; London: Cumberlege. 1956. x and 380 pp. 42s. net.]

Studies in comparative public law and comparative political institutions are apt to be interesting but unilluminating. Too often the writer sets out with a grim determination to compare the incomparable; or, worse still, with a set of fixed value-judgments derived from a universalisation of the norms accepted by the political society in which his own experience lies. Professor Livingston's study of the amending process in federal constitutions is not wholly free from the latter defect, but it is none the less a work of unusual quality. On Canada, Australia, Switzerland and the United States he says everything that needs to be said; he sets out and analyses all the relevant rules of constitutional law with meticulous accuracy, and shirks none of the difficulties; his exposition is a model of clarity. He is rightly concerned not merely with rules of strict law but also with constitutional conventions and political realities. He examines the practical working of the amending process in the various federal systems, and shows how differences in historical background and political climate have caused institutional devices that are similar in form (*e.g.*, the referendum in Switzerland and Australia) to produce essentially differing results.

This book is likely to become the standard work on constitutional amendment in the older federal systems. On the newer systems it is less satisfactory. There is no discussion of the amending procedure in India (though the relevant constitutional provisions are set out in an Appendix) and no reference at all to the interesting devices adopted for the Federation of Rhodesia and Nyasaland. On the other hand, consideration is given to the amending procedure in the Union of South Africa and the United Kingdom. This is because the author wishes to show that States unitary in formal structure may yet follow the principle of regional consultation in the matter of constitutional amendment, whereas authoritarian States that are federal in formal structure have often had fundamental constitutional changes imposed by the Centre. To the author, federal characteristics exist in a political society whenever diverse elements are grouped on a territorial basis. The procedure for constitutional amendment is one of the federal instrumentalities by which regional diversities become articulated, and the extent to which it serves its purpose can be measured by the degree in which regional participation and consultation in the amending process is a reality. But he exaggerates the importance of provincial sentiment in the Union (except, perhaps, in Natal) and underestimates the constitutional significance of party attitudes towards the colour question, which cut across provincial divisions; the manner in which the Senate was recently reconstituted in disregard of established provincial rights brings out this point. He gives no illustration of the actual consultation of regional interests when constitutional changes have been contemplated in the United Kingdom. He could well have investigated the background to the changes made in the royal style and titles in 1953, though one suspects that

the facts might not altogether assist his general argument. All in all, however, this is a very able piece of work, lucid, well-arranged and excellently documented.

S. A. de Smith.

Studi di Diritto Comparato. I. Diritto Degli Stati Uniti. By Angelo Piero Sereni, Professore dell'Università di Ferrara e della New York University. [Milano: Dott. A. Giuffrè Editore. 1956. vii and 531 pp. with index. Lire 3000.]

The foreign contacts of the older generation of Italian lawyers were most commonly with Germany—hence perhaps the excessive conceptualism of some of their writing. The present generation is showing increasing interest in the Anglo-American common law; a striking testimony was given when in 1954 Professor Gorla of Pavia published his remarkable two-volume critical comparative study entitled *Il Contratto*. Professor Sereni covers a wider field and his main purpose is rather descriptive than critical. Three of his chapters (which have already appeared as articles in Italian legal journals) are on general themes: The Common Law in the United States, Codification and Case Law, Equity in the United States. Others deal with wills and administration and with company law. There is an acute discussion (critical of the work of Berle and Means) of the legal-economic aspects of capitalism in the United States, and a long section giving a descriptive and comparative account of civil procedure in the United States.

Much of what the author has to tell his Italian readers is of course already familiar to the common lawyer, but it is always salutary to see ourselves as others see us and some of Professor Sereni's generalizations and comments, whether we agree with them or not, may stimulate us to reflection. He observes that, generally speaking, the English and Americans have regarded the value of law as functional and have not conspicuously displayed the almost aesthetic admiration for elegant doctrinal construction which is sometimes manifest in the Latin countries. Perhaps this is true in most parts of our law, but what of our elaboration in the field of property? Are we to deny to the old property lawyer his aesthetic admiration for Fearne on *Contingent Remainders*? Professor Sereni himself stresses that in the common law the concept of property is more fundamental and has been more thoroughly elaborated than in the civil law, while our doctrinal development of obligations has been correspondingly less rigorous and perfect. Professor Sereni is of course right in stressing the importance, as factors shaping both the general form of the common law and the outlook of its practitioners, of procedural considerations, of the conservatism of professional tradition and of the peculiar characteristics of judge-made law, although some of his remarks (notably at pp. 48 *et seq.*) may give the Italian reader an idea of judicial freedom which is not appropriate to modern England. It must be remembered, however, that Professor Sereni's eyes are turned on the United States. This is manifest at several points, for instance, in his reference to the procedural use of *habeas corpus* and in his chapter on companies, where the American company practice which he describes is often more alien to our ways than is the Italian with which he contrasts it. To the common lawyer the most surprising of Professor Sereni's generalizations is that (p. v) the common law has a horror of secrecy and little respect for privacy and that (p. 426) the reason may be that the Protestant has less feeling than the Latin Catholic for protecting the sacred intimacy of personality. It may be that he has slightly misinterpreted his evidence, at any rate, some words on p. iv seem to suggest that the common law imposes in all situations a duty of full disclosure such as exists in relations *uberrimae fidei*. Nevertheless, it is his opinion that, in spite of exclusionary rules of evidence, the examination of

a witness in the United States is more thorough and production of documents can be compelled in more ample measure than in Latin European countries; that American tax returns and questionnaires addressed to recruits, to students and others are more detailed and searching; and that the American business man is less able to hide himself behind the veil of incorporation. It may be so, but, even if it be so, there may yet be differences between Protestant America and Protestant Britain; there may be other factors at work besides differences of religious tradition. Whatever be the explanation, it is at least interesting that a foreign observer should have gained this impression.

A. H. Campbell.

Some Problems of Proof under the Anglo-American System of Litigation. By E. M. Morgan. [New York: Columbia University Press; London: Cumberlege. 1956. xiii and 207 pp. 28s. net.]

More than half a century ago General Carpentier established in the United States a fund for the purpose of providing lectures on jurisprudence by persons of pre-eminent fitness and ability. Many lawyers, prominent in different spheres, have lectured under this trust, and the thirteenth series of lectures was delivered in 1955 by one well qualified to join their company. Professor Morgan, the doyen of modern American writers on Evidence, gave the six lectures on that subject which are printed in this book.

In the first lecture he discusses the relation of pleading to preparation for trial. Here his preliminary treatment is historical, and forms an introduction to a plea for rules which compel disclosure of a party's case in the pleadings. He then considers some of the Federal Rules of Civil Procedure, with reference particularly to discovery and pre-trial hearings, and concludes: "The first step toward making a lawsuit a rational proceeding for discovering the factual basis of a controversy is acceptance of these provisions of the Federal Rules. The next is a complete renovation of the rules of evidence" (p. 35). English lawyers may think that their own procedural rules in civil proceedings adequately accomplish the former object; indeed, the impression on an English reader left by this lecture, and reinforced by other parts of the book, is of the wide gulf which separates American and English procedure, and hence the application of many common law rules of evidence. The second lecture deals with judicial notice, and is partly concerned with supporting the contention that matters judicially noticed are indisputable. In the third lecture, on the functions of judge and jury, it is pointed out that there is seldom any mention of the extent to which the judge decides questions of fact by allocating the burden of proof and giving binding instructions as to the requisites for its discharge (p. 70), and the learned author accordingly proceeds to discuss these points. His emphasis upon trial by jury and a motion for a directed verdict (pp. 73, 186) indicates the divergence between American and modern English practice, and to some extent accounts for the American classification of burdens of proof. Further divergences appear from his discussion of the functions of judge and jury in relation to admissibility.

The remaining three lectures are devoted to the history and theory of the hearsay rule, the rule in theory and practice, and that rule in conjunction with other exclusionary rules. These lectures support Professor Morgan's second desideratum, and, since radical reform seems improbable, they include a plea for serious consideration of the Uniform Rules of Evidence (pp. 140, 168). The final lecture is mainly composed of a hypothetical case, designed to illustrate some of the anomalies of the exclusionary rules, particularly that against hearsay. Although "a party is not permitted to put in his evidence piecemeal" (p. 73), it appears that in the United States a defendant may refrain from cross-examining the plaintiff about parts of the defence, unsuccessfully submit "no case," and then recall the plaintiff as the defendant's

witness to give evidence on the points omitted from his cross-examination (pp. 186–190). Such a procedure again suggests that there may be as many disparities between the application of the common law of evidence in America and England as there are in the use of our common language. Yet the similarities remain, and Professor Morgan's lucid and cogent lectures will gratify his readers on both sides of the Atlantic.

G. D. Nokes.

Palmer's Company Precedents, Part I, General Forms. Seventeenth edition. By K. W. Mackinnon, m.b.e., Barrister-at-Law (Consulting Editor), and R. Buchanan-Dunlop, Barrister-at-Law (Editor). [London: Stevens & Sons, Ltd. 1956. civ and 1293 pp. £7 7s. net. (The complete set of 3 vols. £18 18s.)]

My first reaction upon seeing this new edition was to exclaim "Bless thee, Bottom, bless thee! Thou art translated." This, however, was perhaps less than fair to the editors of the former editions (who had not in fact allowed it to sink so low as that might imply) or to the new edition which, far from being asinine, is a radiant transformation. Instead of the somewhat perfunctory editing which this classic has sometimes suffered from in the past there has been a complete refurbishing from beginning to end of both text and appearance. To all intents and purposes this is a new book with little trace of the old except the familiar name. This radical overhaul was not an act of impiety but the beginning (I hope not yet the end) of a long-overdue reformation. It is appropriate that it should have appeared in the centenary year of the first Joint Stock Companies Act—though, with respect, it is something of an exaggeration to describe that Act, as does the learned editor in his Preface, as having given birth to the joint stock company.

Among the many improvements, attention may be drawn to the inclusion of notes and references to some 750 decisions in other parts of the Commonwealth. It is to be hoped that this will encourage English practitioners to be less insular in their approach to this subject; it will certainly make the book far more useful to practitioners in the Dominions, most of which lack a comparable treatise of their own. The editor states (and one can believe him) that this has involved considerable research. It may accordingly appear ungenerous to suggest that sufficient care has not always been shown here. If, however, the reader's attention is arrested (as mine was) by the exciting statement, at p. 694n., that "in India . . . the court refused to follow *Salomon* v. *Salomon*, . . ." he must be warned that his excitement is unjustified. The authority cited, *Damodara* v. *Indian National Agencies*,[1] merely followed *Re Express Engineering Works*,[2] which, in turn, merely applied an exception to the corporate entity principle recognised in *Salomon's* case itself. Nor does the choice of cases cited seem wholly satisfactory.

The obsolete objects clauses which cluttered up the former edition have been expunged. An the previous form of articles has, rightly, been replaced by a form based on Table A, modified where this appeared desirable. Some may doubt whether the editor has always gone far enough with his suggested modifications. For example, in the light of the decided cases[3] it is surely

[1] [1945] I.L.R. (Mad.) 728. In the text the plaintiff's name is given as *Damadora* but the correct spelling is given in the Table of Cases.

[2] [1920] 1 Ch. 466. The case is correctly cited (except as regards the spelling) at p. 476 but is not mentioned again at pp. 563–564 where it is relevant.

[3] See especially *Read* v. *Astoria Garage* [1952] 1 All E.R. 922 (affd. on other grounds [1952] Ch. 637), which suggests that under Table A the board cannot grant a service contract to a managing director which will not be lawfully terminated if the managing director is voted off the board or resigns as a director.

desirable to modify clause 107 of Table A to make it clear that the board of directors can appoint a managing director with an effective long-term contract? What exactly the position is under Table A is obscure, but it cannot be said that the commentary on pp. 589–591 either resolves these obscurities or makes it wholly clear that they exist.

Among other points which might receive attention in the next edition are the following:—

Rather fuller treatment seems to be desirable of the Control of Borrowing Orders. And there has been a serious failure to keep up to date on Exchange Control; S.R. & O. 2041 of 1947 (which is cited and relied on) was replaced by S.I. 1635 of 1954, and the various declarations which appear in all the precedents of share applications and transfers are rarely needed since Bank of England Notice E.C. Securities 8 allowed them to be dispensed with where the transactions are effected through "authorised depositories." And now that the book is in charge of a tax expert, could we not have still fuller treatment of the tax implications? There has certainly been some much-needed amplification here, and what is said is accurate and helpful—which is more than one could say in the past—but tax aspects are hardly given the attention which their practical importance deserves.

The statement (at p. 109) of what offers are outside the prospectus provisions may require reconsideration in the light of section 38 (3) of the Act. And it would be helpful to draw attention somewhere to the practice of avoiding the need to obtain a Trading Certificate and to hold the Statutory Meeting by forming as a private company and immediately converting into a public one.

There is no precedent for a *private* company limited by guarantee and not having a share capital. Such companies are often appropriate and the practitioner can hardly be expected to know by the light of nature that a company without shares can nevertheless restrict the right to transfer them and thereby qualify for the advantages of a private company.

It would also be helpful if the status of the court could be indicated after the case reference; very occasionally this is done, but generally not.

All these are small points—though some of them are not unimportant in practice and just the kind of things on which one looks for guidance to a manual of this sort. Mention of them must not obscure the fact that this new edition is a really good job. There are not many books which are indispensable but I would not care to dispense with this one.

L. C. B. G.

MEDICAL NEGLIGENCE. By LORD NATHAN, P.C. [London: Butterworth & Co., Ltd. 1957. 204 pp. 35s. net.]

THE author has had a twofold purpose in writing this book. First, he has attempted to provide legal practitioners with a comprehensive statement of the law relating to the liability of medical practitioners and medical institutions for professional negligence. Secondly, he has sought to guide members of the medical and nursing professions and hospital administrators on the nature of their professional responsibility. Lord Nathan has succeeded in attaining these seemingly divergent objectives. The book is simply and lucidly written, and yet does not shirk the complexities of the subject.

The author has a keen eye for the important problems, and his analysis of the case-law is incisive. He comes down firmly in favour of the view that the liability of hospitals is a personal not a vicarious one, and that hospitals are liable for the negligence of visiting surgeons (as distinct from surgeons who are directly engaged by patients occupying pay-bed accommodation of National

Health Service hospitals). As he points out, it is remarkable how little English case-law there is on some important points; *e.g.*, the liability of a surgeon who operates in an emergency without consent. He is to be congratulated on the extensive use which he makes in such instances of American and Commonwealth decisions—practitioners should be grateful for the introduction to these cases. Lord Nathan does appear, however, to have leaned rather too heavily on case encyclopedias for his comparative materials. A balanced view of the American law cannot be obtained by random selection of cases from particular states; the cases must be supplemented by an examination of the periodical literature, none of which appears to have been referred to. Similarly the digest approach will not always track down apposite cases which appear under another rubric; *e.g.*, the important Canadian case of *Cook* v. *Lewis* is omitted.

Lord Nathan poses many interesting problems which have not been decided in reported cases, *e.g.*, whether an anaesthetist may be liable for breach of warranty (even in the absence of negligence) if the substance is not reasonably fit to be administered; and he even suggests that such an action would have lain in *Roe* v. *Minister of Health*. He examines at some length in the light of the relevant statutory instruments the relationship between patient and practitioner under the National Health Service; but your reviewer is not convinced that because the practitioner is required to contract with the local executive council to tender patients all proper and necessary treatment, it follows that a patient from whom treatment is improperly withheld has an action against his doctor for breach of statutory duty. Likewise it seems to be a *non sequitur* that because hospitals are made liable in tort notwithstanding that they are exercising functions on behalf of the Minister, *therefore* the Minister is not liable (this is one of the rare cases when a relevant Ministry of Health circular has not been cited).

The least satisfactory part of the book is that on Damages, which the author added "so as to complete the picture for the purpose of . . . non-legal readers." It discusses hardly any of the many important problems relating to medical matters and damages and in the next edition should either be omitted or expanded so as to attain the high standard maintained throughout the remainder of the book.

Harry Street.

The Transfer of Chattels in Private International Law. A Comparative Study. By G. A. Zaphiriou. [University of London. The Athlone Press. 1956. xx and 227 pp. 30s. net.]

Very shortly after the publication of Dr. Lalive's book (reviewed (1956) 19 M.L.R. 327) Mr. Zaphiriou has produced another monograph on the transfer of chattels in the conflict of laws—a subject which has given rise to singularly few difficulties in the practice of English courts, but which, from the point of view of the academic lawyer is indeed fascinatingly obscure. In this country the most troublesome problem has proved to concern the title to chattels (and other property) transferred involuntarily, particularly by way of confiscation. It is an advantage of Mr. Zaphiriou's book that he has devoted some attention to this question (pp. 117–127), though it cannot be said that he throws much new light on it. The discussion would have been capable of considerable expansion and it would, perhaps, have gained in clarity if the author, who, as he explains (p. 3), is not concerned with general assignments had given some guidance on the definition of the term "chattels." Does he think that, without qualification, it comprises ships or bearer shares? It is by no means certain that in connection with confiscation all "chattels" are on the same level.

Like Dr. Lalive, the author holds that it is the *lex situs* which governs the existence of proprietary rights (Part I). He recognises that the effect and extent of this principle is a matter of considerable difficulty, and in Part II of his book, therefore, he fully discusses the field of its application: conflicts between the proper law of the contract and the *lex situs*; prerequisites of the transfer; rescission of a sale; the passing of risk; transfers by non-owners and so forth. The third Part is devoted to the determination of the connecting factor in point of time, to what Mr. Zaphiriou calls "dynamic" conflicts. Throughout the author employs the comparative method, though one cannot help feeling that the material used by him is somewhat limited in scope, and though a reader who has Lalive's book in mind must sometimes feel a little bewildered. Thus Mr. Zaphiriou tells us (p. 67) that "all Continental legislations and most Continental authors 'specialise' the question of capacity to transfer which they subject to the personal law of the parties." Dr. Lalive seems to suggest the opposite (p. 128).

This is the work of a serious student whose arguments, presented with moderation, will be found weighty and illuminating. It will force upon private international lawyers the discouraging conclusion that no subject can ever be said to be exhausted. By way of example, taken at random, the reader is invited to study Mr. Zaphiriou on the question whether proprietary rights are acquired where an incomplete set of facts occur in country X and the goods are removed to country Y (pp. 164 *et seq.*). He should then read Mr. Lalive on the same problem (pp. 147 *et seq.*). He will observe that each of these learned writers has his own contribution to make. This in itself would be sufficient to welcome Mr. Zaphiriou's book as a valuable addition to the available literature in general and the University of London Legal Series in particular.

In his future writings Mr. Zaphiriou will, it is hoped, take greater care in following accepted methods for citation and abbreviation. "H.L.R." for Harv. L.R., "Zitelman" for Zitelmann, "H.I.P." for Handbuch des Internationalen Privatrechts, "I K.B." for 1 K.B., and similar irritating features should be avoided.

F. A. Mann.

Sterling-Dollar Diplomacy. By Richard N. Gardner. [Oxford: At the Clarendon Press. 1956. xxii and 423 pp.]

It is no exaggeration to say that this book, though written by a lawyer practising in New York, does not contain a single word about law. Yet it is not only the courtesy of the publishers who sent the book to the Editors of this *Review*, but also the contents of the work that merit some comment in a legal periodical.

In 1951 Mr. Gardner who has had an extraordinarily comprehensive training came to Oxford as a Rhodes scholar. Under the guidance of Mr. Roy Harrod he decided to write a book on the history of Anglo-American relations in the field of economics (and, to some considerable extent, politics) between about 1941 and 1947. This work, written with great lucidity and a remarkable degree of academic detachment, deals with the financial implications of the Atlantic Charter, Lend-Lease, the developments leading to the creation of the International Monetary Fund and the Bank for Reconstruction, the American Loan of 1946, the policies surrounding the Havana Charter and many incidental matters. Multilateralism, the convertibility of sterling, stability of currencies, the fate of the sterling balances, Imperial Preference and American tariffs—these are some of the most important issues which dominated the period and which the author describes. He draws a picture of the principal personalities, such as Lord Keynes, Harry Dexter White, Clayton, Cordell Hull, Vinson, Snyder and many others. He explains the changing political forces which

determined the course of events, and sets forth the manifold influences, misconceptions and prejudices which contributed so largely to eventual failure. The author lets the facts speak for themselves and frequently refrains from criticism so as to allow or rather force the reader to draw his own conclusions. Many of these will be of a political character or affect one's judgment of personalities. What concerns readers of this *Review*, however, lies in the fact that Mr. Gardner provides the historical background without which the international lawyer interested in international finance and economics or in such institutions as the International Monetary Fund cannot understand his subject. The number of those who, as lawyers rather than students of economics and politics, will be attracted by Mr. Gardner's book is bound to be small. But their gratitude to the author and their admiration for his scholarship will be great.

F. A. Mann.

The Calvo Clause. A Problem of Inter-American and International Law and Diplomacy. By Donald R. Shea. [Minnesota University Press. London: Cumberlege. 1956. xv and 323 pp. £2 5s. net.]

There are few problems more pressing, either in international law *sensu stricto* or in international affairs generally, than that of providing some means whereby private capital can be attracted to the so-called "underdeveloped" countries. As is well known, the flow of this capital is impeded at present by fears of expropriation on the one hand and exploitation on the other hand. It is the great merit of this book that the purely legal problems of the Calvo Clause are seen and studied against this wider background. The author, who is a member of the political science faculty in the Milwaukee division of the University of Wisconsin, has indeed succeeded in making a valuable and much needed contribution to the study of international economic law.

The book begins with a summary of the basic principles of the famous "Calvo Doctrine." These are stated as follows: (i) "that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from interference of any sort by other states, whether it be by force or diplomacy"; and (ii) "that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities." Professor Shea next considers the varied and, on the whole, abortive attempts of the Latin American countries to enforce this doctrine by treaty, by constitutional provisions and by municipal legislation. The Calvo Clause consists essentially of an attempt to enforce the Calvo Doctrine by contractual stipulation and operates as follows. An alien contracting with a Latin American government is obliged to accept a clause in his contract which states that in all matters relating to the contract he shall be considered as a local national and shall not be entitled to seek diplomatic intervention on his behalf by his own government. Many writers regard the Calvo Clause either as superfluous or as invalid. In so far as it prevents the alien's own government from intervening until "local remedies" have been exhausted, it is superfluous because that is already the position under general international law. In so far as it purports to prevent the alien's government from intervening at all, it is invalid because an individual citizen cannot under international law waive the rights of his own State.

Professor Shea shows, however, that the traditionally contemptuous attitude of North American and European writers towards the Calvo Clause is defective in a number of ways and is not supported either by the arbitral decisions or, on the whole, by the practice of their own governments. While it may be true that the arbitral decisions before 1926 give no firm indication of the law one way or the other, there is no doubt that, subsequent to the

decision in the *North American Dredging Company* case in that year, it has become very difficult to hold that the Calvo Clause has no legal effect whatever. This case was of particular importance because the arbitration agreement contained a provision waiving the necessity of exhausting local remedies, with the result that the Calvo Clause could be considered on its merits and free of its supposed connection with the local remedies rule. Although Professor Shea is critical of the award he acknowledges the importance of the decision of the arbitrators to give a limited legal effect to the Calvo Clause, and he concludes: "The true importance of the case lies in the fact that the commission held that the Clause was binding on the individual in that it precluded him from presenting to his government any claim connected with the contract, but not binding on his state in that it would not prevent his government from espousing a claim based on the violation of international law."

Professor Shea has no difficulty in showing that the view that the Calvo Clause binds the individual alien, but does not prevent his government from intervening in cases of a "denial of justice," has received a good deal of support from governments and subsequent arbitral decisions. This view has merit in that it represents a compromise between the extreme positions taken up in Latin America on the one hand and in North America and Europe on the other hand. But it is no real solution. It merely converts the difficulty from one of applying the Calvo Clause—which is after all a written text—into one of applying the vague concept of a "denial of justice." Moreover, although the effect of holding that the Calvo Clause binds the individual may be to bar claims under claims conventions which require that the claim be actually "presented" by the individual to his government—as happened in the *Dredging* case—such an interpretation of the Calvo Clause may be altogether without effect in those cases where a State purports to espouse a claim that has not been formally "presented" to it. Even if this difficulty be admitted to be academic rather than practical, it remains true, as Professor Shea points out, that the problem of the Calvo Clause is really only part of a much larger problem, that of the status of the individual under international law. In Professor Shea's opinion, these questions may find their ultimate solution in the establishment of an international court to which aggrieved individuals may appeal directly.

It is not surprising, therefore, that Professor Shea is unable to come to any very definite conclusion as regards the present status of the Calvo Clause, let alone as regards its future. But this in no way detracts from the value of his survey. As a result of correspondence with United States embassies in Latin America he is even able to make known a good deal of information of a kind which it is otherwise very difficult to discover. Thus, it appears that today the Calvo Clause is used extensively by Mexico, Nicaragua, Venezuela, Ecuador, Paraguay and Peru; less extensively by other Latin American countries; and hardly at all by Argentina (despite the Argentinian origin of Calvo himself), Haiti and the Dominican Republic. The information thus made available about the commercial practice of the Latin American governments should ensure that this book is of value to a far wider circle than that consisting merely of specialists in international law.

D. H. N. Johnson.

Law and Structures of Social Action. By Kenneth S. Carlston, Professor of Law in the University of Illinois. Library of World Affairs, Volume 30. [London: Stevens & Sons, Ltd. 1956. xii and 288 pp. 35s. net.]

This book is devoted, in essence, to a survey and an analysis of the legal relationships arising between the individual and the political and economic organisations, both municipal and international, of which he is a part. The

author's thesis is that law emerges from, and is a reflection of, social behaviour; as a result he approaches an examination of the organisational life of a society by means of a study of the psychological and sociological bases of law. A strong hint of his own position is contained in a significant quotation from Holmes with which the book is prefaced

> "To be master of any branch of knowledge you must master those which lie next to it. And thus to know anything you must know all."

Professor Carlston establishes his thesis that law is an instrument of social control through an examination of differing forms of group action and interaction in primitive legal systems; his conclusion that "living law" is simply a combination of "norms" of behaviour is then, after a brief and rather unsatisfactory excursus on the "institutionalisation" of law in the Roman Empire and in England (pp. 38–52), applied to the concept of the sovereign State. Following Max Weber he adopts a "behaviourist" definition of the State from the point of view of the existence and acceptance of authority (p. 60); most Western lawyers would agree with his conclusion that the distinguishing characteristics of the Democratic State should be its insistence on the individual rather than the group as the focal point for its system of municipal values (pp. 62–84), and its emphasis on negotiation and the sanctity of contract in its international relations (pp. 115–127).

Following upon this his examination of law in the world community (pp. 128–189) is, to the present reviewer, the most interesting and convincing part of the entire work. Once again a quotation from Holmes sets the keynote (p. 171):

> "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

The "societas gentium" is seen to derive from economic interdependence; surely then the most useful road to world peace may be found through the international economic and service organisations, the "specialised agencies" of UNO, rather than through the operations of national governments? This is a view that has come increasingly to the fore in recent years and Professor Carlston argues persuasively for greater co-ordination of international economic activity rather than an extension of propaganda based on "internationalism" (pp. 173–189). Many international lawyers will feel sympathy with these arguments, yet they represent an over-simplification of the extra-legal problems involved; it is not enough to dismiss the fundamental political division between East and West with the assumption that an "equilibrium of force and interest" will arise and be maintained by mutual agreement.

In the last part of the book (pp. 194 *et seq.*) the author examines some legal problems posed by economic organisations within the municipal law of the U.S.A. His study of American anti-trust laws since the Sherman Act of 1890 links up well with a final short comparative survey of the problem of monopolies in general, of the place and protection of the individual within the framework of the labour unions, of collective bargaining, and of international and national controls on restrictive business practices. Although these are all highly specialised fields of study Professor Carlston is able to show that the legal objectives to be sought here are identical with those underlying his earlier chapters—the correlation of freedom with responsibility in both municipal and international law and the destruction of the myth of state independence.

Fortunately, bearing in mind these objectives and the author's method, the book possesses the twin virtues of clarity and cogency; in spite of much close reasoning and compression, in spite of its occasionally strained use of language, the text is very often compelling, original and stimulating. The reader's respect is soon gained and the value of the text is enhanced by a bibliography and footnotes which give evidence of a most extensive, but selective, range of authorities. This is a worthy addition to the "Library of World Affairs" and has much of interest to offer on many widely differing aspects of law in human society.

K. R. Simmonds.

Entscheidungen des Bundesverfassungsgerichts. Herausgegeben von den Mitgliedern des Bundesverfassungsgerichts. Vol. 4, 1956. [Tübingen: J. C. B. Mohr (Paul Siebeck). viii and 448 pp. DM 25.]

Applications to the Supreme Constitutional Court are nowadays held to be a legitimate way of solving political problems in Germany. At least the Socialist Party seems to be convinced that a defeat in a parliamentary debate can best be made good by disputing in court the legality of those measures which the parliamentary majority has approved. Whatever one may think of the political wisdom of such a course, there can be little doubt that it has its distinct advantages for lawyers. The work of the Federal Constitutional Court would, no doubt, attract far less interest if it did not include those cases which were brought before the court's attention in this manner. Undoubtedly, the decision on the constitutional admissibility of the Saar Statute forms the most interesting part of the present volume. The Socialist members of the Bonn Federal Parliament had petitioned the court to declare the Federal law relating to the Saar agreement with France to be unconstitutional. The main argument, submitted by the petitioners, was that the Saar Statute, which was to be in force until the Peace Treaty, did not provide in the Saar Territory the maintenance of the full legal guarantees of basic rights of individuals which were prescribed by the Basic Law. The court had little difficulty in refuting this argument: the Saar Statute was intended to bring to an end a régime which had guaranteed the basic rights envisaged in the Basic Law to an even lesser degree than did the Saar Statute. International agreements designed to make conditions on German territory correspond better than before to the criteria stipulated by the Basic Law were in the court's view not to be invalidated on the ground that they failed to bring about a perfect solution immediately. It is perhaps not without significance that the court felt justified in dismissing the complaint raised by no fewer than 174 members of the German Parliament, on the strength of arguments, which essentially are not legal conclusions, but sound political common sense. Eventually, in fact, the Saar Statute was not adopted, because of the adverse vote which it received in the plebiscite. But the proceedings in the German Federal Constitutional Court undoubtedly retain a considerable political, historical and sociological interest.

E. J. Cohn.

The British Year Book of International Law. 1955–1956. (Vol. XXXII) [Oxford University Press. 1957. 367 pp. 55s. net.]

In the first of the nine articles, which make up the principal content of this issue of the *Year Book*, Sir Hersch Lauterpacht assesses "Brierly's Contribution to International Law." He finds this in the field of the philosophy of international law and he extracts from Brierly's writings a number of basic principles which were developed in response to the challenge of his times. This account of Brierly's philosophy succeeds in painting a clear picture of a mind distinguished by integrity and independence, rather than originality, by conscientiousness and urbanity, rather than forcefulness. The history of the same period provides the subject for an article on the "Decline of the Optional Clause" by Professor Waldock which concludes with some suggestions to remedy the defects of the present system. The International Court also provides the theme for another article, by Sir Gerald Fitzmaurice, which continues the survey of the work of the Court between 1951–1954 begun in earlier volumes of the *Year Book*. The United Nations forms the subject of articles by Dr. Bowett, who

examines the meaning and theoretical basis of collective self-defence, in general and under Article 51 of the Charter, and by Mr. Johnson, who writes on the effect of resolutions of the General Assembly. Professor Bentwich describes the legal machinery established to secure restitution and compensation for the victims of the Nazis. Dr. Looper explains the solutions proposed to meet the difficulties of federal states in implementing treaty obligations and concludes that a "technique for reconciling federalism with the new internationalism has yet to be devised." Mr. E. Lauterpacht examines the meaning of *munitions de guerre* under the Hague Regulations concerning the law of war. Finally, there is an article on Private International Law, contributed by Dr. Cheshire who claims that the decision of the Court of Appeal in *The Assunzione* constitutes a decisive endorsement of the objective theory of the proper law of a contract.

These articles, followed by notes and by comments on English decisions and reviews of books complete a volume which maintains fully the high standards of scholarship and topicality of the *British Year Book of International Law.*

J. U.

Reflections of the Law in Literature. By F. Lyman Windolph. [Pennsylvania: University Press; London: Oxford University Press. 1956. 83 pp. 22s. net.]

The law and literature have many connections and on reflection it is astonishing how many great authors started their lives as lawyers. Fielding was a magistrate: Scott an advocate of the Edinburgh Bar: Dickens a lawyer's clerk: even Henry James—incredible though it may seem—went to the Harvard Law School. James's view of the law as expressed through the mouth of the hero of his first and favourite novel "Roderick Hudson" is, however, far from flattering. "This morning," says Roderick, "I took the bull by the horns. I picked up an armful of law books that have been gathering the dust in my room for the last year and a half and presented myself at the office. 'Allow me to put these back in their places,' I said, 'I shall never have need for them more—never more, never more, never more!' 'So you've learned everything they contain?' says the great Striker, leering over his spectacles: 'better late than never.' 'I've learned nothing that you can teach me,' I cried. 'But I shall tax your patience no longer. I'm going to be a sculptor. I'm going to Rome to work at *that*. So now there! I won't bid you goodbye just yet; I shall see you again. But I bid goodbye here with enthusiasm to these four detested walls—to this living tomb! I didn't know till now how I hated the place! My compliments to Mr. Spooner and my thanks for all you've not made of me.'" Roderick eventually paid the full penalty for such temerity, for he ended his career prematurely at the foot of a Swiss cliff.

Mr. Windolph thus made a happy choice in selecting as his topic for the 1955 North Foundation Lectures at Franklin and Marshall College "reflections of the law in literature," and his three charming lectures are now reproduced in permanent form. One is somewhat dismayed, however—even in these days of expensive books—by its price. Twenty-two shillings for a book of eighty-three pages seems monstrously high.

For his first essay "Trollope and the Law," the author has selected one of the political novels "Phineas Redux," less well known than the Barsetshire series, but no less interesting and as delightfully written. Phineas, the hero, is a barrister with parliamentary ambitions, who becomes involved in a murder case, not as an advocate but as a suspect! There is nothing of the mystery novel about the book which is of quite a different character from "Edwin Drood" or "The Moonstone," since Trollope reveals from the beginning both the innocence of his hero and the identity of the guilty party. The interest of the novel thus hinges on what the police are going to think and the action they will take. Using the plot as a peg Mr. Windolph conveys a great deal

of useful information about English law to his American audience, and although the theme is somewhat slight, the essay is gracefully executed.

Mr. Windolph's second essay has Shakespeare for its subject. Some have maintained that Shakespeare served a youthful apprenticeship as a lawyer's clerk, basing this opinion on the technical knowledge of the law shown in so many of his plays, and an allusion by Thomas Nashe to an "English Seneca," who had left "the trade of Noverint" (law-scrivener) and was capable of writing "whole Hamlets." Most scholars, however, are now agreed that the allusion was to Thomas Kyd, the author of an earlier Hamlet which Shakespeare used as a source for his own play. Lord Campbell certainly credited Shakespeare with vast legal knowledge and actually wrote a book on the subject "Shakespeare's Legal Requirements," less well known that his "Lives of the Lord Chancellors," which according to Wetherell, "added a new terror to death," but well worth reading. After an exhaustive survey Lord Campbell concluded that "to Shakespeare's law, lavishly as he propounds it, there can neither be demurrer nor bill of exceptions nor writ of error." As always, Lord Campbell was inaccurate, and discovered less than a hundred legal allusions in the plays, while Mr. Windolph who combines the burrowing mole-like qualities we have come to associate with American scholars with a charm of style which they alas seldom possess, has unearthed three hundred. He endorses the opinion of Sir Sidney Lee that the law thus presented is "a mingled skein of accuracy and inaccuracy" and the errors "far too numerous and important to justify on sober inquiry the plea of technical experience." Mr. Windolph's homely conclusion is that "Shakespeare simply kept his ears open, as his custom was." Two famous scenes from Shakespeare are discussed in the course of his essay —the graveyard scene in "Hamlet" and the trial scene in "The Merchant of Venice." He traces the graveyard scene to the famous case of *Hales* v. *Petit*, a coroner's inquiry into the suicide of Sir James Hales, who was one of Lady Jane Grey's judges, and possibly suffered from a troubled conscience. As to the trial scene in "The Merchant of Venice," he reveals its many inconsistencies and takes Lord Campbell to task for his opinion that the trial was "duly conducted according to the strict rules of legal procedure." Academic lawyers, however, cannot but approve of Shakespeare's handling of the case, in view of the extreme deference paid to the views of Portia, who in her role of visiting jurisconsult from Rome virtually decided the case. Nevertheless, how much simpler it would have been for Antonio to apply for an injunction against Shylock! In fairness to Shakespeare, however, one must remember that the scene was Italy where the blessings of Equity have never been known.

Mr. Windolph's final essay is "Browning and the Law," and in it he considers "The Ring and the Book," based on a seventeenth-century Italian story of passion and murder, ending in the trial of the guilty parties. These essays may not be "prose gems" as the publishers claim, but they certainly make pleasant reading and have a delicate tincture of erudition which never becomes oppressive.

NORMAN ST. JOHN-STEVAS.

A SOURCE BOOK AND HISTORY OF ADMINISTRATIVE LAW IN SCOTLAND. Edited by M. R. MCLARTY, M.A., and G. CAMPBELL H. PATON, M.A., LL.B. [Edinburgh: William Hodge and Co., Ltd. 1956. 244 and (index) 23 pp. 21s.]

JUDICIAL PROCESS UPON BRIEVES 1219–1532. By HECTOR MCKECHNIE, Q.C., B.A., LL.B. [Glasgow: Jackson, Son & Co. 1956. 31 pp. 5s.]

THE first of these works is not strictly a source book. It is rather a series of historical articles on different aspects of administration in Scotland, all by

different authors. It covers both structure (of central and local agencies), and functions, and the articles are in the main straightforward accounts of statutory developments. They are not always proportionate in length to the importance of their subject-matter. Roads and Bridges get rather more space than does Education, and partly because of this and because of the form of the book, it is often difficult for the reader to get a general picture. Nevertheless, in a difficult subject the book does provide a useful guide to the sources and material. The development in Scotland has in many ways differed fundamentally from that in England, and those familiar with the larger system can here find signposts to the differences.

The second work is a reprint of the David Murray lecture delivered by Sheriff McKechnie in 1956. He is concerned with the scope, development and decay of the system of judicial brieves as a means of instituting proceedings. The account is a carefully documented one which challenges some existing views (including those of Lord Dunedin on the influence of English procedure in this matter). Though in different territory this lecture, too, opens up unfamiliar ground, and suggests routes for further exploration. It is a worthy member of a distinguished series.

Copyright Law Symposium No. 7. Sponsored by the American Society of Composers, Authors and Publishers. [Columbia University Press; London: Cumberlege. 1956. xvi and 252 pp. Price in U.K. 32s. net.]

This further symposium in the A.S.C.A.P. series consists of six essays on copyright submitted from various American Law Schools for the 1954 National Award in the Nathan Burkan Memorial Competition. All are of a high standard and contain matter of interest in the U.K. at a time when we are seeking to reform our copyright law. Especially is this so in the case of the winning essay, "Publication and the British Copyright Law," by Raya S. Dreben of the Harvard Law School. English readers should not be deterred by the occasional jarring note struck by the author's unfamiliarity with the English background (*e.g.*, "Lord Haldane was not a lawyer but the Secretary of State for War" (p. 23). An American, of all people, might have been expected to realise that he could be both!) and by the use of American, rather than English, idiosyncrasies of legal terminology ("Judge Willes," etc.). Other papers deal with the vexed question of the term of copyright (favouring the English rather than the American solution), with the Universal Copyright Convention, with Judge Learned Hand's copyright opinions, and with various aspects of the economics of literary property. All are well-written works of considerable research and well worth reading.

L. C. B. G.

Erbrecht. Ein Lehrbuch von Theodor Kipp. Tenth edition. By Helmut Coing, Professor at the University of Frankfurt, Main. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1956. xv and 568 pp. DM 34.]

As a rule the great classical or semi-classical textbooks deteriorate in the hands of their latter-day editors. In Professor Coing's able hands Kipp's handbook of the German law of inheritance, which forms the fifth part of the standard textbook on the German Civil law by Enneccerus, Kipp and Martin Wolff, has been spared this fate. On the contrary, it may well be said that it has, in addition to preserving those features which have justly made it

famous, acquired fresh merits, making it a better book than it was before. While the lucidity of its exposition has been fully retained, arrangement and style are improved and the historical references as well as those parts which deal with problems of a deontological character are carefully revised and extended. Above all, the editor has introduced systematic references to other Central European laws as well as to English, French and Italian law. There can be few fields of law where even an average practitioner will be more frequently in need of some guidance on foreign law and where even the shortest statement of the elements of foreign legal systems can do a greater amount of good. The learned editor's work in this field is particularly commendable, both for the skill of selection and the accuracy of his explanations. The references to non-German legal literature should, however, be brought up to date. To say that there is no "compulsory portion" in English law is no doubt literally correct. But the Inheritance (Family Provision) Acts should have been mentioned. To non-German users this work will continue to provide the best introduction to a complex subject.

E. J. COHN.

INTERNATIONAL TAX AGREEMENTS, Volume VI, United Nations. Department of Economic and Social Affairs. Fiscal and Financial Branch. [New York 1956. U.N. Publications Sales No. 1956 XVI.1.VII and 262 pp. 14s. net. H.M. Stationery Office.]

THE English legal practitioner unlike his European Continental colleague is not supplied either by H.M. Stationery Office or by the book trade with those conveniently sized reprints of legal texts in the various special fields which form the kernel of Continental lawyers' libraries. The present inexpensive reprint of international tax agreements concluded between 1949 and 1955 will, no doubt, be of some use to a few practitioners in this country, in particular because it contains no fewer than eleven double taxation conventions lately concluded by H.M. Government. Unfortunately this is by no means a model edition. There is no index. Many of the individual reprints contain mysterious lines filled with nothing but dots. It is left to the reader's imagination to guess what they represent. No reference to the original publication is given; this is, of course, particularly regrettable in the case of those agreements which were not concluded in English and of which this book contains an English translation only. The English version or a translation only is reprinted. The dates of ratification are not stated. Surely, the organisation responsible for this publication with its unrivalled facilities of production and distribution could have done a great deal better.

E. J. COHN.

CURRENT LAW YEAR BOOK, 1956. Master Volume, 1952–1956. Current Law Citator, 1947–1956. [London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1957. Two Volumes—£4 4s. net.]

THESE volumes carry the art of indexing to the highest pitch of perfection by introducing a "master volume," which combines the usual entries for 1956 with skeleton entries covering the years 1952–1955. The Index then combines the information collected in this master volume with that given in the Consolidation Volume for 1947–1951 so as to cover in easily accessible manner the whole period 1947–1956. This period is also covered by the Index of Articles and in the separately issued Current Law Citator.

Books and Publications Received

THE INDIAN CONTRACT ACT (9 of 1872). Vols. 1 and 2. By V. V. CHITALEY and S. APPU RAO. [Nagpur: Lawyers Co-Operative Publications, Ltd.]

THE CHEQUE IN LAW AND PRACTICE. An Appraisal of the Bill of Exchange Act, 1882. By MAURICE MEGRAH. 50 pp. The Institute of Bankers Spring Lectures, 1957. 10 Lombard Street, London, E.C.3. 2s. 6d.

THE PLACE OF LAW AND TRIBUNALS IN INTERNATIONAL RELATIONS. A Ludwig Mond Lecture delivered in the University of Manchester by Lord McNair, Q.C. 20 pp. [Manchester: Manchester University Press. 1957.]

MIXED CHARITIES. By the late A. H. WITHERS. With a modern Commentary by SPENCER G. MAURICE. Being a reprint from *The Solicitors' Journal*. 24 pp. [London: The Solicitors' Law Stationery Society, Ltd. 4s. net.]

LAWS OF THE STATE OF ISRAEL. Vol. 8, 5714–1953–1954. 231 pp. Ministry of Justice, Jerusalem.

THE APPORTIONMENT OF DAMAGES ACT, 1956. By R. G. MCKERRON, Q.C., D.C.L. 42 pp. [Capetown: Juta & Co., Ltd. 1956.]

FINANCING OF HOUSING AND COMMUNITY IMPROVEMENT PROGRAMMES. Department of Economic and Social Affairs. United Nations, New York. 61 pp. 1957. [London: H.M. Stationery Office. 4s. 6d.]

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS. Vol. VI, No. 4, 1956, Vol. VII, No. 1, 1957. [Oxford: Basil Blackwell. 12s.]

THE LAW LIST, 1957. Editor LESLIE C. E. TURNER. xxiv and 2489 pp. [London: Stevens & Sons, Ltd. £1 15s.]

HEYWOOD & MASSEY. COURT OF PROTECTION PRACTICE. First Supplement (to April 1, 1957) to Seventh Edition. By DONALD G. HUNT and JOHN F. PHILLIPS. [London: Stevens & Sons, Ltd. 6s. 6d. net.]